



## COMMODITY FUTURES TRADING COMMISSION

### 17 CFR Part 50

### RIN 3038-AE33

### Swap Clearing Requirement Exemptions

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commodity Futures Trading Commission (Commission or CFTC) is adopting amendments to the regulations governing which swaps are exempt from the clearing requirement set forth in applicable provisions of the Commodity Exchange Act (CEA). These amendments exempt from the clearing requirement swaps entered into by certain central banks, sovereign entities, international financial institutions, bank holding companies, savings and loan holding companies, and community development financial institutions. The Commission also is publishing a compliance schedule setting forth all the past compliance dates for the 2012 and 2016 swap clearing requirement regulations. Finally, the Commission is making certain other, non-substantive technical amendments.

**DATES:** The effective date for this final rule is [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

**FOR FURTHER INFORMATION CONTACT:** Sarah E. Josephson, Deputy Director, at 202-418-5684 or [sjosephson@cftc.gov](mailto:sjosephson@cftc.gov); Megan A. Wallace, Senior Special Counsel, at 202-418-5150 or [mwallace@cftc.gov](mailto:mwallace@cftc.gov); Melissa D'Arcy, Special Counsel, at 202-418-5086 or [mdarcy@cftc.gov](mailto:mdarcy@cftc.gov); Division of Clearing and Risk; or Ayla Kayhan, Office of the Chief Economist, at 202-418-5947 or [akayhan@cftc.gov](mailto:akayhan@cftc.gov), in each case at the Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581.

## **SUPPLEMENTARY INFORMATION:**

### **Table of Contents**

#### **I. Background**

- A. Ongoing Review of 17 CFR Part 50 Regulations and May 2020 Proposal
- B. Swap Clearing Requirement
- C. Swaps with Central Banks, Sovereign Entities, and IFIs
- D. DCR No-Action Letters for Four Additional IFIs
- E. DCR No-Action Letters for Certain Bank Holding Companies, and Savings and Loan Holding Companies, and CDFIs
- F. DCR No-Action Letters for Relief for Community Development Financial Institutions

#### **II. Final Rule for Swaps not Subject to the Clearing Requirement**

- A. May 2020 Proposal
- B. Comments Received
- C. Swaps Entered into by Central Banks, Sovereign Entities, and IFIs
- D. Exemption for Certain Central Banks, Sovereign Entities, and IFIs
- E. Data Related to Swaps Entered into by IFIs
- F. Swaps Entered into by Bank Holding Companies, Savings and Loan Holdings Companies, and CDFIs
- G. Exemption for CDFIs
- H. Exemption for Certain Bank Holding Companies and Savings and Loan Holding Companies
- I. Data Related to Swaps Entered into by CDFIs, Bank Holding Companies, and Savings and Loan Holding Companies
- J. Adoption of Subpart D of Part 50

#### **III. Clearing Requirement Compliance Schedule and Compliance Dates**

#### **IV. Technical Amendment to Subpart C for Banks, Savings Associations, Farm Credit System Institutions, and Credit Unions**

#### **V. Commission's Section 4(c) Authority**

- A. Central Banks, Sovereign Entities and IFIs
- B. CDFIs, Certain Bank Holding Companies and Savings and Loan Holding Companies

#### **VI. Final Rules Do Not Effect Margin Requirements for Uncleared Swaps**

#### **VII. Related Matters**

- A. Regulatory Flexibility Act
- B. Paperwork Reduction Act
- C. Cost-Benefit Considerations
- D. Antitrust Considerations

#### **I. Background**

- A. Ongoing Review of 17 CFR Part 50 Regulations and May 2020 Proposal*

On May 9, 2017, the Commission published in the *Federal Register* a request for information seeking suggestions from the public for simplifying the Commission's

regulations and practices, removing unnecessary burdens, and reducing costs.<sup>1</sup> In response, a number of commenters asked the Commission to codify certain staff no-action letters and Commission guidance, including those that are the subject of this rulemaking.<sup>2</sup> The Commission also engaged in an agency-wide review of its regulations and practices to make them simpler, less burdensome, and less costly.

On May 12, 2020, the Commission published a notice of proposed rulemaking<sup>3</sup> that would exempt from the swap clearing requirement (1) swaps entered into by certain central banks, sovereign entities, and international financial institutions (IFIs), as set forth in the preamble to the 2012 End-User Exception final rule;<sup>4</sup> (2) swaps entered into by four additional IFIs that previously received staff no-action letters from the Commission's Division of Clearing and Risk (DCR) in 2013 and 2017;<sup>5</sup> and (3) swaps entered into by certain bank holding companies and savings and loan holding companies, as well as community development financial institutions (CDFIs).<sup>6</sup>

---

<sup>1</sup> See Project KISS, 82 FR 21494 (May 9, 2017) and Project KISS, 82 FR 23765 (May 24, 2017).

<sup>2</sup> See, e.g., Comment letter from the Institute of International Banking, International Swaps and Derivatives Association, Inc., and Securities Industry and Financial Markets Association, dated July 24, 2017, at 2.

<sup>3</sup> Swap Clearing Requirement Exemptions, 85 FR 27955 (May 12, 2020) (hereinafter referred to as the May 2020 Proposal).

<sup>4</sup> May 2020 Proposal at 27957-27961 (citing the End-User Exception to the Clearing Requirement for Swaps, 77 FR 42560 (Jul. 19, 2012)).

<sup>5</sup> See CFTC Letter No. 13-25 (June 10, 2013) (providing no-action relief to the Corporación Andina de Fomento); CFTC Letter No. 17-57 (Nov. 7, 2017) (providing no-action relief to Banco Centroamericano de Integración Económica); CFTC Letter No. 17-58 (Nov. 7, 2017) (providing no-action relief to the European Stability Mechanism and for which an expiration date was added in CFTC Letter Nos. 19-23 (Oct. 16, 2019), 20-13 (Apr. 14, 2020), and 20-22 (Aug. 27, 2020) (providing that no-action relief to the European Stability Mechanism expires on December 31, 2020)); and CFTC Letter No. 17-59 (Nov. 7, 2017) (providing no-action relief to the North American Development Bank).

<sup>6</sup> The May 2020 Proposal included a supplemental notice of proposed rulemaking related to an August 2018 proposal issued by the Commission. See Amendments to Clearing Exemption for Swaps Entered Into by Certain Bank Holding Companies, Savings and Loan Holding Companies, and Community Development Financial Institutions, 83 FR 44001 (Aug. 29, 2018) (hereinafter referred to as the August 2018 Proposal). Both the August 2018 Proposal and the May 2020 Proposal (together, the Proposals) proposed to codify CFTC Letter No. 16-01 (Jan. 8, 2016) (providing no-action relief to certain small bank holding companies and savings and loan holding companies pursuant to a request from the American Bankers Association); and CFTC Letter No. 16-02 (Jan. 8, 2016) (providing no-action relief to community development financial institutions pursuant to a request from a coalition of such entities).

The Commission also proposed revisions to part 50 intended to simplify the requirements and minimize compliance burdens for market participants. The Commission proposed to add a compliance date chart for all swaps that the Commission has determined are required to be cleared under Commission regulation §50.4.<sup>7</sup> In addition, the Commission proposed improvements to the structure and organization of 17 CFR part 50 through heading changes and restructuring amendments.<sup>8</sup> Finally, the Commission proposed the creation of a new subpart D to distinguish 17 CFR part 50 exemptions that apply to specific swaps from the exceptions and exemptions for market participants eligible to elect an exception or exemption under subpart C.<sup>9</sup>

*B. Swap Clearing Requirement*

Title 17 CFR part 50 of the Commission's regulations implements the swap clearing requirement under section 2(h) of the CEA. The swap clearing requirement under section 2(h)(1)(A) of the CEA states that if the Commission requires a swap to be cleared, then it is unlawful for any person to engage in that swap unless the swap is submitted for clearing to a derivatives clearing organization (DCO) that is registered under the CEA or a DCO that the Commission has exempted from registration. The Commission has adopted swap clearing requirement determinations for certain classes of interest rate swaps and credit default swaps.<sup>10</sup> Swaps that are subject to the

---

<sup>7</sup> May 2020 Proposal, 85 FR at 27962.

<sup>8</sup> For example, the Commission proposed that the provisions exempting eligible banks, savings associations, farm credit institutions, and credit unions from the definition of "financial entity" for purposes of the swap clearing requirement be moved to a separate regulation at 17 CFR 50.53 so that the exemption is easier to locate and the conditions to claim the exemption are set forth more clearly. *See* May 2020 Proposal, 85 FR at 27962-27963.

<sup>9</sup> *See id.* at 27959-27960.

<sup>10</sup> Clearing Requirement Determination Under Section 2(h) of the CEA, 77 FR 74284 (Dec. 13, 2012) (hereinafter referred to as the 2012 Clearing Requirement Determination) and Clearing Requirement Determination Under Section 2(h) of the CEA for Interest Rate Swaps, 81 FR 71202 (Oct. 14, 2016) (hereinafter referred to as the 2016 Clearing Requirement Determination).

Commission's swap clearing requirement are described in Commission regulation §50.4 (Clearing Requirement).

Title 17 CFR part 50 of the Commission's regulations also includes a number of exceptions to and exemptions from the Clearing Requirement. Certain of these exceptions or exemptions are based on statutory principles (*e.g.*, the end-user exception),<sup>11</sup> and others were adopted pursuant to the Commission's public interest exemption authority (*e.g.*, the exemption for swaps entered into by certain cooperatives and the exemption for swaps between affiliated entities).<sup>12</sup>

*C. Swaps with Central Banks, Sovereign Entities, and IFIs*

In the preamble to the 2012 End-User Exception, the Commission determined that foreign central banks, foreign governments, and IFIs should not be subject to the swap clearing requirement set forth in section 2(h)(1) of the CEA.<sup>13</sup> This determination was based on considerations of comity and was in keeping with the traditions of the international system.<sup>14</sup> The Commission also stated that the Bank for International Settlements (BIS), of which the Federal Reserve and foreign central banks are members, should be considered to be a foreign central bank, and, therefore, swaps entered into by the BIS should not be subject to the Clearing Requirement.<sup>15</sup>

The Commission provided several reasons in support of its determination. First, the Federal Reserve Banks and the Federal Government are not subject to the Clearing

---

<sup>11</sup> 2012 End-User Exception, 77 FR 42560.

<sup>12</sup> Clearing Exemption for Certain Swaps Entered Into by Cooperatives, 78 FR 52286 (Aug. 22, 2013); Clearing Exemption for Swaps Between Certain Affiliated Entities, 78 FR 21750 (Apr. 11, 2013); and Exemption from the Swap Clearing Requirement for Certain Affiliated Entities – Alternative Compliance Frameworks for Anti-Evasionary Measures, 85 FR 44170 (Jul. 22, 2020).

<sup>13</sup> See 2012 End-User Exception, at 42561-42562.

<sup>14</sup> See *id.*

<sup>15</sup> *Id.* at 42561, n.13.

Requirement under the CEA.<sup>16</sup> Therefore, the Commission stated it would expect that if any part of the Federal Government, the Federal Reserve Banks, or IFIs of which the United States is a member were to engage in swaps in a foreign jurisdiction, the actions of those entities with respect to those swaps should not be subject to foreign regulation.<sup>17</sup> Second, the Commission stated that canons of statutory construction “assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws.”<sup>18</sup> Third, the Commission noted that IFIs operate with the benefit of certain privileges and immunities under U.S. law, which indicates that such entities may be treated similarly under certain circumstances.<sup>19</sup> Finally, the Commission stated that there is nothing in the text or legislative history of the swap-related provisions of the Dodd-Frank Act to establish that Congress intended to deviate from the traditions of the international system by subjecting foreign central banks, foreign governments, or IFIs to the Clearing Requirement set forth in section 2(h)(1) of the CEA.<sup>20</sup>

In the preamble to the 2012 End-User Exception, the Commission also determined that the IFIs that would be exempt from the Clearing Requirement to be those

---

<sup>16</sup> *Id.* at 42562. Under the Dodd-Frank Act, Congress specifically excluded any agreement, contract, or transaction a counterparty of which is a Federal Reserve bank, the Federal Government, or a Federal agency that is expressly backed by the full faith and credit of the United States from the definition of a swap under section 1a(47)(B)(ix) of the CEA. Pub. L. 111-203, 124 Stat. 1376 (2010). Only transactions that are swaps are subject to the Clearing Requirement. *See* section 2(h) of the CEA.

<sup>17</sup> *Id.* at 42561-42562.

<sup>18</sup> *Id.* at 42562 (citing *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004)).

<sup>19</sup> *Id.* at 42562 (citing various provisions of the U.S. Code and a CFTC staff interpretative letter, which stated that “[b]ased on the unique attributes and status of the World Bank Group as a multinational member agency, . . . the CFTC believes that the World Bank Group need not be treated as a U.S. person for purposes of application of the CFTC’s Part 30 rules.”). The Commission also cited to a determination of the Board of Governors of the Federal Reserve that the Bank Holding Company Act does not apply to foreign governments because they are not “companies” as such term is defined in the Bank Holding Company Act. *Id.*

<sup>20</sup> *Id.* at 42562. The Commission also noted that if a foreign central bank, foreign government, or IFI enters into an uncleared swap with a counterparty that is subject to the CEA and Commission regulations with regard to that transaction, then the counterparty should still comply with applicable Commission requirements under parts 23 and 45 of the Commission’s regulations. *Id.*

institutions defined as such in section 262r(c)(2) of Title 22 of the U.S. Code,<sup>21</sup> and the multilateral development banks (MDBs) included in the Proposal for the Regulation of the European Parliament and of the Council of the European Union Final Compromise Text, Article 1(4a(a)) (March 19, 2012).<sup>22</sup> Under EMIR, European authorities exempted 12 MDBs from all requirements apart from reporting obligations.<sup>23</sup> Based on these two sources, the Commission identified 17 IFIs that would not be subject to the Clearing Requirement under its policy determination.<sup>24</sup>

*D. DCR No-Action Letters for Four Additional IFIs*

Based on the Commission's action in the preamble to the 2012 End-User Exception, DCR issued staff no-action letters to four additional IFIs stating that the

---

<sup>21</sup> 22 U.S.C. 262r(c)(2). The IFIs included in the U.S. Code in 2011 were the International Monetary Fund, International Bank for Reconstruction and Development, European Bank for Reconstruction and Development, International Development Association, International Finance Corporation, Multilateral Investment Guarantee Agency, African Development Bank, African Development Fund, Asian Development Bank, Inter-American Development Bank, Bank for Economic Cooperation and Development in the Middle East and North Africa, and Inter-American Investment Corporation.

<sup>22</sup> 77 FR at 42561 n.14. This provision was enacted as Article 1(5)(a) of the European Market Infrastructure Reform (EMIR), and exempts those entities from all but the reporting requirement of EMIR. See Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, 2012 OJ (L201)1. Section 4.2 of part 1 of Annex VI to Directive 2006/48/EC, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012R0648> and <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006L0048>. See also discussion below regarding subsequent updates to EMIR.

<sup>23</sup> The 12 entities exempt from the EMIR were the following: (1) International Bank for Reconstruction and Development; (2) International Finance Corporation; (3) Inter-American Development Bank; (4) Asian Development Bank; (5) African Development Bank; (6) Council of Europe Development Bank; (7) Nordic Investment Bank; (8) Caribbean Development Bank; (9) European Bank for Reconstruction and Development; (10) European Investment Bank; (11) European Investment Fund; and (12) Multilateral Investment Guarantee Agency. The Commission noted that the exemption for IFIs would be consistent with EMIR and other foreign laws. 77 FR at 42561 n.14.

<sup>24</sup> The 17 international financial institutions identified in the preamble to the 2012 End-User Exception final rule are: (1) African Development Bank; (2) African Development Fund; (3) Asian Development Bank; (4) Bank for Economic Cooperation and Development in the Middle East and North Africa; (5) Caribbean Development Bank; (6) Council of Europe Development Bank; (7) European Bank for Reconstruction and Development; (8) European Investment Bank; (9) European Investment Fund; (10) Inter-American Development Bank; (11) Inter-American Investment Corporation; (12) International Bank for Reconstruction and Development (part of the World Bank Group); (13) International Development Association (part of the World Bank Group); (14) International Finance Corporation (part of the World Bank Group); (15) International Monetary Fund; (16) Multilateral Investment Guarantee Agency (part of the World Bank Group); and (17) Nordic Investment Bank. 77 FR at 42561-42562 n.14.

division would not recommend the Commission take enforcement action against such entities for not clearing swaps that otherwise would be subject to the Clearing Requirement, provided the IFIs satisfied certain conditions.<sup>25</sup> These institutions include: (1) the Corporación Andina de Fomento (CAF), an economic development financing institution established pursuant to a treaty among 10 Latin American countries;<sup>26</sup> (2) Banco Centroamericano de Integración Económica (CABEI), an economic development financing institution established pursuant to a treaty among 11 Latin American countries, Spain, and Taiwan;<sup>27</sup> (3) the European Stability Mechanism (ESM), a lending institution established by European Union member states to provide emergency financial assistance to member states located in the Eurozone;<sup>28</sup> and (4) the North American Development Bank (NADB), a financing institution established by the United States and Mexico under the auspices of the North American Free Trade Agreement to finance environmentally sustainable infrastructure projects in the region along the U.S.-Mexican border.<sup>29</sup> In their request letters, CAF, CABEI, ESM, and NADB each stated that their functions, missions, and ownership structures are analogous to the functions, missions, and ownership structures of the IFIs included in the 2012 End-User Exception.<sup>30</sup>

---

<sup>25</sup> DCR required each IFI to comply with other provisions of the CEA and the Commission's regulations, such as the recordkeeping and reporting requirements under parts 23 and 45 of the Commission's regulations, which would apply to an uncleared swap entered into by an IFI opposite a counterparty that is otherwise subject to the CEA and Commission regulations.

<sup>26</sup> CFTC Letter No. 13-25.

<sup>27</sup> CFTC Letter No. 17-57.

<sup>28</sup> CFTC Letter No. 17-58. In CFTC Letter No. 20-22, on August 27, 2020, DCR staff extended the expiration date of this no-action letter until December 31, 2020. The relief provided in CFTC Letter No. 20-22 will continue until the effective date of these final rules.

<sup>29</sup> CFTC Letter No. 17-59.

<sup>30</sup> For example, NADB was included as a MDB in the report required by 22 U.S.C. 262r(c)(2) since as early as 2012. The 2012 Report to Congress from the Chairman of the National Advisory Council on International Monetary and Financial Policies (December 2013) (referred to herein as the 2012 NAC Report), and subsequent reports, are available at <https://www.treasury.gov/resource-center/international/development-banks/Pages/congress-index.aspx>.



*E. DCR No-Action Letters for Certain Bank Holding Companies and Savings and Loan Holding Companies and CDFIs*

In 2016, DCR staff issued a no-action letter providing that the division would not recommend enforcement action against certain bank holding companies and savings and loan holding companies for not clearing swaps subject to the Clearing Requirement if such entities satisfy certain conditions.<sup>31</sup> At the same time, staff issued a no-action letter providing that DCR would not recommend enforcement action against CDFIs for not clearing certain swaps subject to the Clearing Requirement, under specific conditions.<sup>32</sup> These bank holding companies, savings and loan holding companies, and CDFIs were not eligible to elect an exception to the Clearing Requirement under Commission regulation §50.50(d) because they are not depository institutions.

The 2016 DCR no-action letter for bank holding companies and savings and loan holding companies applies only to holding companies with no more than \$10 billion in consolidated assets.<sup>33</sup> This limitation is consistent with the statutory provisions under section 2(h)(7)(C)(ii) of the CEA and Commission regulation §50.50(d) applicable to depository institutions and savings associations. The DCR letter also requires that such a holding company be using swaps to hedge or mitigate commercial risk and notify the Commission how it generally meets the obligations associated with entering into uncleared swaps.<sup>34</sup> Many bank holding companies and savings and loan holding

---

<sup>31</sup> CFTC Letter No. 16-01 (Jan. 8, 2016) (providing no-action relief to certain small bank holding companies and savings and loan holding companies pursuant to a request from the American Bankers Association).

<sup>32</sup> CFTC Letter No. 16-02 (Jan. 8, 2016) (providing no-action relief to CDFIs pursuant to a request from a Coalition of CDFIs).

<sup>33</sup> Under CFTC Letter No. 16-01, the limitation of no more than \$10 billion in consolidated assets means that the aggregate value of all the assets of all the bank holding company's or savings and loan holding company's subsidiaries on the last day of each subsidiary's most recent fiscal year, do not exceed \$10 billion. CFTC Letter No. 16-01, at 4.

<sup>34</sup> See CFTC Letter No. 16-01, at 4.

companies enter into interest rate swaps to hedge interest rate risk that they incur as a result of issuing debt securities or making loans to finance their subsidiary banks or savings associations.<sup>35</sup> In addition, these swaps generally have a notional amount of \$10 million or less, and the bank holding companies and savings and loan holding companies enter into swaps less frequently than other swap counterparties. Further, the bank holding company or savings and loan holding company, rather than the subsidiary bank or savings association, must enter into the swap in order to gain hedge accounting treatment.<sup>36</sup>

Also, in 2016, in response to a request from a coalition of CDFIs, DCR staff issued a no-action letter providing that the division would not recommend that the Commission take enforcement action against a CDFI for failure to comply with the Clearing Requirement, provided certain conditions are met.<sup>37</sup> DCR limited the letter to CDFIs certified as such by the U.S. Department of the Treasury that engage in no more than 10 interest rate swaps per year, with an aggregate notional value cap of \$200 million per year.<sup>38</sup> However, DCR recognized that there are public interest benefits that may be served by permitting CDFIs to engage in limited swaps activity that serves smaller, local communities.<sup>39</sup> DCR also was persuaded that status as a CDFI, pursuant to certification by the Treasury Department's Community Development Financial Institutions Fund (CDFI Fund), would ensure that CDFIs operate under a specific community development

---

<sup>35</sup> CFTC Letter No. 16-01, at 3.

<sup>36</sup> *Id.*

<sup>37</sup> See CFTC Letter No. 16-02, at 4. DCR required CDFIs to file a notice of election and additional information as described in Commission regulation §50.50(b), and limited the election of the exception to swaps entered into for the sole purpose of hedging or mitigating commercial risk as described in Commission regulation §50.50(c). *Id.* Letter No. 16-02 also noted that the letter did not excuse the affected persons from compliance with any other applicable requirements contained in the CEA or in the Commission's regulations. *Id.*

<sup>38</sup> See Certification as a Community Development Financial Institution, 12 CFR 1805.201.

<sup>39</sup> CFTC Letter No. 16-02, at 3.

organizational mission and provide financial and community development services to a targeted market.<sup>40</sup>

## **II. Final Rule for Swaps not Subject to the Clearing Requirement**

### *A. May 2020 Proposal*

On May 12, 2020, the Commission proposed amendments to Part 50 of the Commission's regulations to create new exemptions from required clearing consistent with the policy statements made by the Commission in the 2012 End-User Exception and six no-action letters issued by DCR beginning in 2013, to add a compliance date chart, and to make other non-substantive technical amendments. The Commission requested comments from market participants on all aspects of the May 2020 Proposal.

### *B. Comments Received*

The Commission received ten comment letters in response to the May 2020 Proposal.<sup>41</sup> Nearly all the comments letters supported the Commission's proposal. Specific aspects of these comments, including suggested changes to the rule text and other clarifications, are discussed in detail below.

One commenter, Better Markets, expressed opposition to the proposed exemptions for a number of reasons. Better Markets stated that the Commission's

---

<sup>40</sup> Community development financial institutions are small in scale and tend to serve smaller, local markets. They operate under an organizational mission of providing financial and community development services to underserved target markets. Community development financial institutions are entities that must apply for, and receive, certification from the CDFI Fund. The CDFI Fund was created by section 104 of the Community Development Banking and Financial Institutions Act of 1994, which is contained in Title I of the Riegle Community Development and Regulatory Improvement Act of 1994. *See* Pub. L. No. 103-325, 108 Stat. 2160 (1994). *See* CFTC Letter No. 16-02, at 3.

<sup>41</sup> The Commission received comments from the following: (1) American Bankers Association; (2) Asian Infrastructure Investment Bank (AIIB); (3) BIS; (4) Better Markets, Inc. (Better Markets), (5) Chris Barnard; (6) the Capital Impact Partners, Community Housing Capital, Enterprise Community Loan Fund, IFF, Low Income Investment Fund, Reinvestment Fund, and Self-Help Ventures Fund (CDFI Coalition); (7) ESM; (8) Inter-American Development Bank, the Inter-American Investment Corporation, the International Bank for Reconstruction and Development, and the International Finance Corporation (collectively referred to as Commenting IFIs); (9) New South Wales Treasury Corporation and (10) the Opportunity Finance Network. All comments are available on the Commission's website at: <https://comments.cftc.gov/PublicComments/CommentList.aspx?id=3112>.

proposal to permit financial entities to elect not to clear swaps subject to the Clearing Requirement is unnecessarily complex, undermines the Dodd-Frank Act's financial reform effort, and could serve as a drain on liquidity in the cleared swap market. The Commission believes that the final rules make the overall regulatory framework for cleared swaps less complex, codify longstanding practice, and are narrowly tailored to limit any impact on cleared swaps market liquidity.

*C. Swaps Entered into by Central Banks, Sovereign Entities, and IFIs*

In the May 2020 Proposal, the Commission proposed to codify its determination that swaps entered into by central banks, sovereign entities, and IFIs, set forth in the preamble to the 2012 End-User Exception final rule,<sup>42</sup> are not subject to the Clearing Requirement under section 2(h)(1) of the CEA.<sup>43</sup> The Commission received six comment letters addressing this aspect of the proposal.<sup>44</sup> After considering the comments, the Commission is adopting the rules largely as proposed. The final regulations are consistent with the policy the Commission set out in the preamble to the 2012 End-User Exception, and in finalizing the exemption for swaps entered into by central banks and sovereign entities in regulation §50.75 and the exemption for swaps entered into by IFIs in regulation §50.76, the Commission is providing legal certainty that such swaps entered into by a narrow group of entities are not subject to the Clearing Requirement.

In response to comments received, the Commission is making one important modification to the final regulations to clarify that the exemption is not dependent on the exempted swaps being reported to a swap data repository under Commission regulation

---

<sup>42</sup> See 2012 End-User Exception, 77 FR at 42561-42562.

<sup>43</sup> *Id.* at 42562. As discussed in the preamble to the May 2020 Proposal, the Commission will refer to "foreign governments" as "sovereign entities" because it considers "foreign governments" and "sovereign entities" to mean the same thing. 85 FR at 27956 n.7, 27959.

<sup>44</sup> The following comments addressed this proposal: Chris Barnard, AIIB, ESM, BIS, New South Wales Treasury Corporation, and Commenting IFIs.

§§45.3 and 45.4, and this reporting obligation does not fall to central banks, sovereign entities, or IFIs.<sup>45</sup> As discussed further below, the Commission did not intend this result and is modifying the rule text accordingly.

1. Definition of Central Bank – § 50.75(a)

The Commission proposed to define “central bank” to mean a reserve bank or monetary authority of a central government (including the Board or Governors of the Federal Reserve System or any of the Federal Reserve Banks) or the Bank for International Settlements. The Commission did not receive any comment on its proposed definition of central bank and is adopting the definition for “central bank” as proposed.

2. Definition of Sovereign Entity – § 50.75(b)

The Commission proposed to define “sovereign entity” to mean a central government (including the U.S. Government), or an agency, department, or ministry of a central government. In the 2012 End-User Exception final rule, the Commission referred to certain exempt swap counterparties as “foreign governments.” The term “foreign government” is intended to refer to sovereigns, similar to the U.S. Federal Government, that are located outside of the United States. Because the Commission distinguished the Federal Government from state and local government entities, the term “foreign government” is intended to apply only to the Federal level of governmental organizations.<sup>46</sup>

The Commission requested comment on the scope of the proposed definition and whether an alternative definition should be adopted. The Commission received one

---

<sup>45</sup> Under one reading of the proposed rule text, the exemption is dependent on reporting the swap to a swap data repository. *See* May 2020 Proposal, 85 FR at 27959.

<sup>46</sup> 77 FR at 42562. The Commission stated that Congress did not expressly exclude state and local government entities from the “financial entity” definition. On the contrary, in section 2(h)(7)(C)(i)(VII) of the CEA, Congress expressly included employee benefit plans of state and local governments in the “financial entity” definition, thereby prohibiting them from using the end-user exception. *Id.*

comment from New South Wales Treasury Corporation addressing this issue and proposing alternative definitions for consideration.

The commenter stated that comity and the traditions of the international system support including foreign states and instrumentalities (such as agencies, departments, or ministries) under the definition of “sovereign entity.” The commenter further stated that the Commission should not limit its concept of “sovereign entities” based on the American distinction between states and the Federal Government because this would adversely impact foreign governments that operate under systems where the Federal and state governments exist as independent bodies but operate within a financially integrated system. The commenter proposed that the Commission consider alternative definitions of “sovereign entity” including: (1) a definition that includes all foreign state governments, agencies, departments, and ministries; (2) a definition that includes named jurisdictions that have a constitutional basis for sovereign authority based on a comparable recognition of the foreign state or public authority as a “sovereign” under national laws; (3) a definition based on recognition of foreign public sector entities based on government (state or Federal) ownership; or (4) a definition based on the alignment of an entity with capital adequacy standards under foreign laws.

The Commission considered this comment and its proposed alternative definitions of “sovereign entity.” The Commission believes the definition of “sovereign entity” adopted in this final rule appropriately limits the exemption in a manner that is consistent with the 2012 End-User Exception and provides clarity regarding the scope of swaps that are not subject to the Clearing Requirement. The second and fourth alternatives proposed by the commenter would require the Commission periodically to reassess which entities are included in the definition based on geopolitical events or whether a specific entity meets capital adequacy standards under foreign law. The Commission does not believe

that these alternatives provide standards that are feasible to implement; nor are they helpful in identifying foreign government entities that are similar to the U.S. Federal Government. Rather, the Commission has purposefully defined the term “sovereign entity” so that it excludes the concept of “state governments.”

The first and third alternatives proposed by the commenter would add references to foreign state governments or entities based on state government ownership. Under the best reading of section 2(h)(7) of the CEA, it is appropriate to limit the exemption from the Clearing Requirement to national governments thereby excluding state, regional, provincial, or municipal governments. This limitation applies equally to U.S. and non-U.S. governmental entities. The Commission continues to believe, as it did in 2012, that most governmental entities are predominantly engaged in non-banking and non-financial activities related to their core public functions and, therefore, are not likely to be “financial entities” ineligible to elect an exception from the Clearing Requirement under section 2(h)(7)(C) of the CEA.<sup>47</sup> The activities of state and local government entities in the United States and internationally that might be in the business of banking or financial in nature under section 2(h)(7)(C)(i)(VIII) of the CEA “are likely to be incidental, not primary, activities of those entities.”<sup>48</sup> Nevertheless, because some state or local government entity’s swap activity may be commercial in nature, the Commission does not believe that a *per se* exclusion for state and local government entities from the Clearing Requirement is appropriate. Accordingly, the Commission has determined not to include these entities or any of the four suggested alternatives in the definition of “sovereign entity” and is adopting the definition of “sovereign entity” as proposed.

---

<sup>47</sup> 85 FR at 27960 (citing 2012 End-User Exception, 77 FR at 42562-42563).

<sup>48</sup> *Id.* at 27960 (quoting 2012 End-User Exception, 77 FR at 42562-42563).

In addition, adopting any of the alternative definitions of “sovereign entity” proposed by the commenter would diverge from the approach taken by the Commission in the margin for uncleared swaps rules under Part 23. Maintaining consistency between the application of the Clearing Requirement and the application of the margin for uncleared swaps regulations avoids introducing unnecessary complication and possible confusion for swap market participants due to the interrelationship between the two sets of regulations.

### 3. Definition of IFI – § 50.76(b)

As proposed, regulation 50.76 would define “international financial institution” to mean the 17 entities the Commission identified in the 2012 End-User Exception final rule,<sup>49</sup> the four entities to whom DCR issued no-action letters in 2013 and 2017,<sup>50</sup> the Islamic Development Bank,<sup>51</sup> and any other entity that provides financing for national or regional development in which the U.S. Government is a shareholder or contributing member.

The Commission received one comment on the definition of IFI. The Asian Infrastructure Investment Bank (AIIB) requested that it be included as an IFI because it is

---

<sup>49</sup> The 17 IFIs identified in the 2012 End-User Exception final rule are the following: (1) African Development Bank; (2) African Development Fund; (3) Asian Development Bank; (4) Bank for Economic Cooperation and Development in the Middle East and North Africa; (5) Caribbean Development Bank; (6) Council of Europe Development Bank; (7) European Bank for Reconstruction and Development; (8) European Investment Bank; (9) European Investment Fund; (10) Inter-American Development Bank; (11) Inter-American Investment Corporation; (12) International Bank for Reconstruction and Development (part of the World Bank Group); (13) International Development Association (part of the World Bank Group); (14) International Finance Corporation (part of the World Bank Group); (15) International Monetary Fund; (16) Multilateral Investment Guarantee Agency (part of the World Bank Group); and (17) Nordic Investment Bank.

<sup>50</sup> CAF; CABEI; ESM; and NADB.

<sup>51</sup> The Islamic Development Bank is included in the definition of “multilateral development bank” under Commission regulation §23.151, the definitions applicable to the Commission’s margin for uncleared swaps rules and was included as an IFI in the May 2020 Proposal for this reason.



similar to other IFIs under proposed regulation §50.76(b).<sup>52</sup> According to AIIB, inclusion on the list would encourage international comity and promote cross-border cooperation, particularly with regard to European Union authorities because AIIB is exempt from the clearing obligation under European law.<sup>53</sup> AIIB also states that the CEA does not require that the U.S. Government be a shareholder or contributing member of a foreign institution in order to qualify for an exemption from the Clearing Requirement, and ten of the 22 institutions included in regulation 50.76 do not have the U.S. Government as a shareholder or contributing member.<sup>54</sup> AIIB argues that it is comparable to the other IFIs under the proposed rule and should be afforded similar treatment.<sup>55</sup>

The Commission does not believe it would be appropriate to include AIIB as an IFI for purposes of an exemption from the Clearing Requirement for a number of reasons. First, the CEA does not prescribe that the swaps of all foreign central banks, foreign sovereign entities, or IFIs should be exempt from the Clearing Requirement. Rather, pursuant to section 4(c) of the CEA, the Commission must find that exempting swaps entered into with AIIB from required clearing is consistent with public interest, taking into account principles of international comity.

---

<sup>52</sup> AIIB notes that in 2018 it submitted a request to DCR for no-action relief from the Clearing Requirement based on the same factors discussed in the DCR letters issued in 2013 and 2017. AIIB Letter at 3, n. 8. AIIB is a MDB that began operating on January 16, 2016. AIIB is an international organization with its principal office located in Beijing, People's Republic of China.

<sup>53</sup> AIIB Comment at 4. AIIB explains that it could not have been included as a MDB under European law in 2012 because it was not yet established. AIIB, along with CAF and CABI, is included on a new list of MDBs that are not subject to the European clearing obligation under Regulation (EU) No 375/2013, Article 117(1) and (2)(p), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02019R0876-20200627>. AIIB argues that the European Union's subsequent recognition of AIIB as a MDB should mean that it is *de facto* an IFI for purposes of an exemption from the CFTC's Clearing Requirement.

<sup>54</sup> AIIB Comment at 4. These institutions include the Bank for Economic Cooperation in the Middle East and North Africa, Caribbean Development Bank, Council of Europe Development Bank, European Investment Bank, European Investment Fund, Islamic Development Bank, Nordic Investment Bank, CABI, CAF, and ESM.

<sup>55</sup> AIIB further states that it has not entered into any swaps with any U.S. counterparty because it is not exempt from the Clearing Requirement and margin requirements. AIIB Comment at 8.

In the 2012 End-User Exception, the Commission did not exempt all IFIs from the Clearing Requirement. Rather, the Commission based its identification of IFIs on the expectation that if any of the Federal Government, Federal Reserve Banks, or *international financial institutions of which the United States is a member* were to engage in swap transactions in foreign jurisdictions, the actions of those entities with respect to those transactions would not be subject to foreign regulation.<sup>56</sup> As explained above, the Commission determined that the exemption from the Clearing Requirement would apply to IFIs defined under 22 U.S.C. 262r(c)(2) and the IFIs defined as MDBs under the proposal for the regulation that became Regulation (EU) No 648/2012, of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories (EMIR).<sup>57</sup>

The IFIs defined in 22 U.S.C. 262r(c)(2) are entities in which the United States is a direct shareholder (or member) and therefore is able to influence the IFI and promote U.S. foreign policy, economic interests, and national security interests abroad.<sup>58</sup> Thus, while there is no requirement in the CEA that the U.S. Government be a shareholder or contributing member of an IFI in order to qualify for an exemption from the Clearing Requirement, the 2012 End-User Exception established a policy that recognized the importance of furthering U.S. policy goals when the Commission listed IFIs of which the United States is a member as the type of entity it would expect to be entitled to relief from mandatory clearing in foreign jurisdictions.

---

<sup>56</sup> 77 FR at 42561-42562 (emphasis added).

<sup>57</sup> 77 FR at 42561 n.14.

<sup>58</sup> The United States also can exert this influence through its membership in an IFI that is a member of another IFI. *See generally* 2012 NAC Report.

Further, it is appropriate to exempt the swaps entered into by CAF, CABEL, ESM, and NADB from the Clearing Requirement.<sup>59</sup> Each of these entities is sufficiently similar to the IFIs identified in the 2012 End-User Exception in that each entity's function, mission, and ownership structure (*i.e.*, comprised of national authorities) is analogous to those IFIs. In addition, it is appropriate to include the Islamic Development Bank as an IFI because it is included as a MDB under Commission regulation §23.151, the definitions section for the margin for uncleared swaps rules. As noted above, consistency between the regulations for required clearing and margin for uncleared swaps helps avoid unnecessary complication and reduce possible confusion among market participants due to the interrelationship between the two sets of regulations.

AIIB differs from the other IFIs in two important respects. First, as AIIB notes, the United States is not a shareholder under AIIB's Articles of Agreement,<sup>60</sup> and the Commission has indicated that the exemption from the Clearing Requirement should apply to IFIs of which the United States is a member. The United States made a determination not to become a shareholder or contributing member of AIIB.<sup>61</sup> This decision was based on, among other things, concerns that the goals of AIIB may not necessarily align with the interest of U.S. foreign policy, economic interests, and national

---

<sup>59</sup> The Commission notes that NADB was considered a MDB in 2012 and is included in the 2012 NAC Report.

<sup>60</sup> The Articles of Agreement may be found here: <https://www.aiib.org/en/about-aiib/who-we-are/financing-operations/index.html>. Under the Articles of Agreement, the number of shares is set at 1,000,000. Membership is divided between regional members and non-regional members, with regional members controlling 750,000 shares, and non-regional members controlling 250,000 shares. China owns 297,804 of the 750,000 regional member shares, with 16,150 shares unallocated.

<sup>61</sup> According to a report from the Congressional Research Service, AIIB was conceived in 2013 as part of China's "one belt, one road" policy. The United States did not join this development bank for two reasons. First, China's voting share (28.7%) is substantially larger than that of the second-largest AIIB member nation (India at 8.3%). This is the largest gap between first and second largest shareholders at any existing MDB. Second, there are two key differences in governance structures: AIIB does not have a resident board of executive directors that represents member countries' interests on a day-to-day basis; and AIIB gives more decision-making authority to regional countries and its largest shareholder (China). Congressional Research Service, Asian Infrastructure Investment Bank, R44754, at 8-10 (Feb. 3, 2017).

security interests. It would not now be appropriate for the Commission to treat AIIB as if the United States had elected to become a member of AIIB. Further, with respect to the IFIs included in regulation 50.76, the member governments generally have a collective majority control and governance over the entities. In AIIB, China is the largest shareholder (controlling 297,804 of 1,000,000 shares), with no other member government holding a block of shares that could realistically influence policy.<sup>62</sup>

Second, AIIB's stated purpose appears to be broader than the entities added pursuant to DCR no-action letters. The stated purpose of CAF is "to promote sustainable development and regional integration, by providing multiple financial services to clients in the public and private sectors of its Shareholder Countries."<sup>63</sup> CABI's objective is "to promote the economic integration and the balanced economic and social development of the Central American region."<sup>64</sup> ESM's purpose is "to mobilize funding and provide stability support under strict conditionality, appropriate to the financial assistance instrument chosen, to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States."<sup>65</sup>

By contrast, AIIB's purpose is to "foster sustainable economic development, create wealth and improve infrastructure connectivity in Asia by investing in infrastructure and other productive sectors" and "promote regional cooperation and partnership in addressing development challenges by working in close cooperation with

---

<sup>62</sup> *Id.*

<sup>63</sup> Article 3, Agreement Establishing Corporación Andina de Fomento (March 2015).

<sup>64</sup> Article 2, CABI Constitutive Agreement (Aug. 22, 2018).

<sup>65</sup> Article 3, Treaty Establishing ESM (Feb. 2, 2012), available at <https://www.esm.europa.eu/legal-documents/esm-treaty>.

other multilateral and bilateral development banks.”<sup>66</sup> The Commission notes AIIB’s broader purpose – particularly to create wealth – along with AIIB’s comments that “AIIB is posed to be a major issuer in the international capital markets” and “will be required to negotiate a significant volume of swaps in connection with issuances under this program” goes beyond other IFIs that serve the public interest needs of developing countries through lending capital.<sup>67</sup>

Finally, the Commission is not persuaded by AIIB’s argument that international comity with European authorities will be enhanced by exempting AIIB’s swaps from the CFTC’s Clearing Requirement. Global authorities, including the CFTC and European authorities, have long acknowledged that there will be differences in the scope of products and participants covered by their respective mandatory clearing regimes.<sup>68</sup> In addition, the relevant country for purposes of considering international comity with regard to AIIB is more likely to be China given that AIIB’s headquarters are in Beijing. The Commission notes that China has issued a clearing mandate for Renminbi interest rate swaps, however, the Commission has not determined that such swaps are required to be cleared.

For these reasons, the exclusion of AIIB from the definition of “international financial institution” for purposes of the Clearing Requirement is an appropriate exercise

---

<sup>66</sup> Article 1, AIIB’s Articles of Agreement (Dec. 25, 2015), available at <https://www.aiib.org/en/about-aiib/basic-documents/articles-of-agreement/index.html>.

<sup>67</sup> AIIB Letter at 7.

<sup>68</sup> 2016 Clearing Requirement Determination, 81 FR at 71203-71205 (providing an overview of relevant clearing mandates adopted in non-U.S. jurisdictions with which the CFTC sought to align its clearing requirement, despite differences in terms of product and participant scope). *See also* the International Organization of Securities Commissions’ Information Repository for Central Clearing Requirements for OTC Derivatives (last updated Dec. 12, 2019), available at [https://www.iosco.org/publications/?subsection=information\\_repositories](https://www.iosco.org/publications/?subsection=information_repositories).

of the Commission's discretion under section 4(c) of the CEA and is consistent with the 2012 End-User Exception.<sup>69</sup>

*D. Exemption for Swaps with Central Banks, Sovereign Entities, and IFIs – § 50.75(a) and 50.76(a)*

Proposed regulation 50.75(a) would exempt from the Clearing Requirement swaps entered into by central banks and sovereign entities. Proposed regulation 50.76(a) would exempt from the Clearing Requirement swaps entered into with IFIs. Under both proposed rules, the Commission included the phrase “and this part if reported to a swap data repository pursuant to §§ 45.3 and 45.4 of this chapter.”

The Commission received two comments on the inclusion of this reporting requirement. Both commenters, the BIS and the Commenting IFIs, supported the codification of the proposed exemptions from the Clearing Requirement, but noted that the Commission did not impose a reporting requirement on central banks, sovereign entities and IFIs in the 2012 End-User Exception. Rather, the commenters explained that under current market practice their swap counterparties report the swap to a swap data repository. The commenters stated that the Commission should clarify that the eligibility

---

<sup>69</sup> The Commission also notes that its decision regarding the scope of the definition of IFI is consistent with the Commission's recently issued Cross-Border Application of the Registration Thresholds and Certain Requirements Applicable to Swap Dealers and Major Swap Participants, 85 FR 56924 (Sep. 14, 2020). In the context of determining the registration threshold for swap dealers, the Commission stated that the term “U.S. person” does not include the International Monetary Fund, the International Bank for Reconstruction and Development, the Inter-American Development Bank, the Asian Development Bank, the African Development Bank, the United Nations, and their agencies and pension plans, and any other similar international organizations, and their agencies and pension plans. 85 FR at 56937. The Commission based its definition on 22 U.S.C. 262r(c)(2) and the European Union's 2012 regulation on “OTC derivatives, central counterparties and trade repositories.” *Id.* (citations omitted). Additionally, the Commission stated there is nothing in the text or history of the swap-related provisions of Title VII to suggest that Congress intended to deviate from the traditions of the international system by including such IFIs within the definitions of the term “U.S. person.” *Id.* (quoting Further Definition of Swap Dealer, Security-Based Swap Dealer, Major Swap Participant, Major Security-Based Swap Participant and Eligible Contract Participant, 77 FR 30596, 30692 n.1189 (May 23, 2012) (citing to 22 U.S.C. 262r(c)(2) and the 2012 European Union definition for support in identifying IFIs as excluded from the definition of “U.S. person” as a discretionary and appropriate exercise of international comity-based doctrines). Finally, as noted above, the list of IFIs recognized in the European Union has since been superseded and updated in Regulation (EU) No 575/2013, Article 117(2).

to claim an exemption is not conditioned on: (i) the central bank, sovereign entity, or IFI itself reporting the swap to a swap data repository; or (ii) its counterparty reporting the swap to a swap data repository.<sup>70</sup>

The Commission agrees with the comments received and did not intend to impose a reporting requirement on central banks, sovereign entities, or IFIs under regulations 50.75(a) and 50.76(a). The Commission is revising the text of the regulation to delete the reference to swap data repository reporting.<sup>71</sup> This edit also is intended to respond to commenters concerns that a counterparty's failure to report a swap to a swap data repository could make those swaps ineligible for the exemption, even if the central bank, sovereign entity, or IFI had no knowledge of the counterparty's failure to report appropriately. The removal of the citation to part 45 reporting from the regulation is intended to permit current practice to continue regarding which counterparty reports the swap to a swap data repository. The removal of the citation is not intended to relieve any swap counterparty's independent obligation to report the swap to a swap data repository under Commission regulation §§45.3 and 45.4.

*E. Data Related to Swaps Entered into by IFIs*

The Commission requested comment on the data it presented regarding the use of swaps by IFIs from the Depository Trust & Clearing Corporation's (DTCC's) swap data repository, DTCC Data Repository (DDR). As the Commission noted in the May 2020 Proposal, from January 1, 2018 to December 31, 2018, 16 IFIs named in proposed regulation 50.76 were counterparties to a swap that was entered into and reported to DDR during that time period. Overall, the 16 IFIs entered into approximately 2,500 uncleared

---

<sup>70</sup> See Commenting IFIs comment at 4-5 and BIS comment at 2-4.

<sup>71</sup> Regulation §50.75(a) is being amended to state that swaps entered into by a central bank or sovereign entity shall be exempt from the clearing requirement of section 2(h)(1)(A) of the Act. Regulation §50.76(a) is being amended to state that swaps entered into by an international financial institution shall be exempt from the clearing requirement of section 2(h)(1)(A) of the Act.

interest rate swaps with an estimated total notional value of \$220 billion. Of those 16, four IFIs entered into more than one hundred swaps during calendar year 2018. Compared to data that the Commission gathered from DDR during calendar year 2017, the number of IFIs entering into interest rate swaps increased from nine to 16, and the total number and total notional value of all uncleared interest rate swaps entered into by IFIs increased from 381 swaps totaling \$59.8 billion to approximately 2,500 swaps totaling \$220 billion.

The Commission did not receive any comments on the data and has no reason to believe this data is not an accurate representation of swaps entered into by IFIs. Based on this data, the scope of swaps entered into by IFIs and eligible for this exemption is quantifiable and does not represent a significant shift in swaps away from the Clearing Requirement. The data also reflects continued interest from IFIs in entering into uncleared swaps with their counterparties.

*F. Swaps Entered into with Certain Bank Holding Companies, Savings and Loan Holding Companies, and CDFIs*

The Commission proposed to exempt from the Clearing Requirement swaps entered into to hedge or mitigate commercial risk if one of the counterparties to the swap is either (a) a bank holding company or savings and loan holding company, each having no more than \$10 billion in consolidated assets, or (b) CDFI transacting in certain types and quantities of swaps.<sup>72</sup> Such an exemption would be consistent with Commission regulation §50.50(d), which permits banks, savings associations, farm credit system institutions, and credit unions with total assets of \$10 billion or less (small financial

---

<sup>72</sup> See August 2018 Proposal, 83 FR 44001 and May 2020 Proposal, 85 FR 27955.



institutions) to elect not to clear their swaps that are used to hedge or mitigate commercial risk.<sup>73</sup>

In adopting Commission regulation §50.50(d), the Commission noted that small financial institutions tend to serve smaller, local markets, and are well situated to provide swaps to the customers in their markets for the purpose of hedging commercial risk.<sup>74</sup> The Commission also noted that small financial institutions typically hedge customer swaps by entering into matching swaps, and if those swaps had to be cleared, small financial institutions would have to post margin to satisfy the requirements of the DCO, which could raise the costs associated with hedging the risks of their swaps with customers.<sup>75</sup> In addition, the Commission acknowledged that some of these small financial institutions may incur initial and annual fixed clearing fees and other expenses that may be incrementally higher relative to the number of swaps executed over a given period of time.<sup>76</sup> Finally, the Commission stated that given the relatively low notional volume of swap books held by these small institutions, and the commercial customer purposes these swaps satisfy, the swaps executed by these entities were what Congress

---

<sup>73</sup> Commission regulation §50.50(d); *see also* 2012 End-User Exception, 77 FR 42560. Commission regulation §50.50(d) exempts for the purposes of the Clearing Requirement, a person that is a “financial entity” solely because of section 2(h)(7)(C)(i)(VIII) of the CEA if the person: (1) is organized as a bank, as defined in section 3(a) of the Federal Deposit Insurance Act, the deposits of which are insured by the Federal Deposit Insurance Corporation; a savings association, as defined in section 3(b) of the Federal Deposit Insurance Act, the deposits of which are insured by the Federal Deposit Insurance Corporation; a farm credit system institution chartered under the Farm Credit Act of 1971; or an insured Federal credit union or State-chartered credit union under the Federal Credit Union Act; and (2) has total assets of \$10,000,000,000 or less on the last day of such person’s most recent fiscal year. Commission regulation §50.50(d) does not excuse the affected persons from compliance with any other applicable requirements of the CEA or in the Commission’s regulations. As discussed below, the Commission is recodifying Commission regulation §50.50(d) as a separate rule, § 50.53, so that it is easier to locate and the conditions to claim the exemption are set forth more clearly. The Commission does not consider this relocation to alter the substance of the exemption.

<sup>74</sup> 77 FR at 42578. The Commission acknowledged that, as indicated by commenters, that a large portion of the swaps executed by these financial institutions with customers likely hedge interest rate risk associated with commercial loans. *Id.*

<sup>75</sup> *Id.* These costs would largely be driven by the costs of clearing in terms of funding the cost of posting initial margin and paying variation margin to the DCO.

<sup>76</sup> *Id.*

was considering when it directed the Commission to consider the exemption for small financial entities.<sup>77</sup>

The proposed amendments would codify two no-action letters issued by DCR in 2016.<sup>78</sup> The Commission believes that codifying both of these staff no-action letters is consistent with the policy rationale behind the exemption from the Clearing Requirement that the Commission granted for swaps entered into by banks, savings associations, farm credit institutions, and credit unions in the 2012 End-User Exception.<sup>79</sup>

The Commission received four comments letters on this aspect of the proposal.<sup>80</sup> While most of the comments were supportive, Better Markets opposed the Commission's use of its public interest exemptive authority to exempt from the Clearing Requirement swaps entered into by these entities. As discussed below, the Commission is adopting the regulations as proposed with one minor clarification.

1. Definition of Community Development Financial Institution – §  
50.77(a)

The Commission proposed to define “community development financial institution” to mean a CDFI, as defined in section 103(5) of the Community Development Banking and Financial Institutions Act of 1994, that is certified by the Treasury Department's Community Development Financial Institution Fund under the requirements set forth in 12 CFR 180.201(b).<sup>81</sup> CDFIs certified by the Treasury

---

<sup>77</sup> *Id.*

<sup>78</sup> CFTC Letter No. 16-01 (request from the American Bankers Association) and CFTC Letter No. 16-02 (request from a coalition of CDFIs).

<sup>79</sup> See August 2018 Proposal at 44004. See also 2012 End-User Exception, 77 FR at 42590-42591.

<sup>80</sup> See Comments submitted by the American Bankers Association, Opportunity Finance Network, Better Markets, and the CDFI Coalition.

<sup>81</sup> Under section 103, a “community development financial institution” means a person (other than an individual) that: (i) has a primary mission of promoting community development; (ii) serves an investment area or targeted population; (iii) provides development services in conjunction with equity investments or loans, directly or through a subsidiary or affiliate; (iv) maintains, through representation on its governing

Department must meet certain community development finance criteria intended to show they promote economic revitalization and community development in low-income communities that lack adequate access to affordable financial products and services.<sup>82</sup> The Commission did not receive any comment on its proposed definition and is adopting the definition as proposed.

## 2. Definition of Bank Holding Company – § 50.78(a)

The Commission proposed to define “bank holding company” to mean an entity that is organized as a bank holding company, as defined in section 2 of the Bank Holding Company Act of 1956.<sup>83</sup> This definition represents the accepted meaning for “bank holding company.” The Commission did not receive any comments on the proposed definition and is adopting the definition as proposed.

## 3. Definition of Savings and Loan Holding Company – § 50.79(a)

The Commission proposed to define “savings and loan holding company” to mean an entity that is organized as a savings and loan holding company, as defined in section 10 of the Home Owners’ Loan Act of 1933.<sup>84</sup> This definition represents the

---

board or otherwise, accountability to residents of its investment area or targeted population; and (v) is not an agency or instrumentality of the United States, or of any State or political subdivision of a State. 12 U.S.C. 4702(5).

<sup>82</sup> See Certification as a Community Development Financial Institution, 12 CFR 1805.201(b)(1) through (6) (setting forth the following criteria for a community development financial institution to obtain Treasury Department certification: (1) it has a primary mission of community development; (2) its predominant business activity is the provision of financial products or financial services; (3) it serves one or more target markets such as an investment area or target population; (4) it has a track record of providing development services to borrowers in conjunction with financing activities; (5) it maintains accountability to the residents of its target market; and (6) it is a non-government entity). See also Community Development Financial Institutions Fund, Notice of Funds Availability, 83 FR 4750 (Feb. 1, 2018) (stating the priorities of the CDFI Fund).

<sup>83</sup> Section 2 of the Bank Holding Company Act generally defines a “bank holding company,” subject to limited exceptions, as any company which has control over any bank or over any company that is or becomes a bank holding company. 12 U.S.C. 1841(a)(1) (subject to exceptions described in paragraph (5) therein).

<sup>84</sup> Section 10 of the Home Owners’ Loan Act generally defines a “savings and loan holding company,” subject to limited exceptions, as any company that directly or indirectly controls a savings association or that controls any other company that is a savings and loan company. 12 U.S.C. 1467(a)(1)(D)(i) (subject to exclusions described in clause (ii)).

accepted meaning for “savings and loan holding company.” The Commission did not receive any comments on the proposed definition and is adopting the definition as proposed.

*G. Exemption from the Clearing Requirement for CDFIs – § 50.77(b)*

The Commission proposed to exempt swaps entered into by a CDFI from the Clearing Requirement if: (1) the swap is a U.S. dollar denominated interest rate swap in the fixed-to-floating class or the forward rate agreement class that would otherwise be subject to the Clearing Requirement under Commission regulation §50.4(a); (2) the total aggregate notional value of the all swaps entered into by the CDFI during the 365 calendar days prior to the day of execution of the swap is less than or equal to \$200,000,000; (3) the swap is one of ten or fewer swap transactions that the CDFI enters into within a period of 365 calendar days; (4) one of the counterparties to the swap reports the swap to a swap data repository pursuant to Commission regulation §§45.3 and 45.4, and reports all information described under Commission regulation §50.50(b) to a swap data repository; and (5) the swap is used to hedge or mitigate commercial risk as defined under Commission regulation §50.50(c). The proposal is consistent with the 2016 DCR no-action relief previously afforded CDFIs.<sup>85</sup>

The Commission received strong support for the proposal. The CDFI Coalition supported the proposal because interest rate swaps help CDFIs manage risk, and CDFIs borrow funds at floating rates and lend to customers at fixed rates. The floating rate leaves the CDFI exposed to future adverse interest rate moves, and interest rate swaps allow the CDFI to hedge its interest rate exposure by converting that exposure to a fixed rate thereby enhancing its ability to lend to customers and fund projects.<sup>86</sup> The CDFI

---

<sup>85</sup> August 2018 Proposal, 83 FR at 44005 (citing CFTC Letter No. 16-02).

<sup>86</sup> CDFI Coalition Letter at 3.

Coalition stated that an exemption from the Clearing Requirement will eliminate the costs of clearing (posting of margin, cost of initial and annual fixed clearing fees and other expenses) and free up the time, effort, and resources that would be necessary to establish intermediary and clearinghouse access. The CDFI Coalition stated that “while the potential volume of interest rate swap activity may increase in the future, it will not reach the level of systemic importance.”<sup>87</sup>

The CDFI Coalition also confirmed that CDFIs enter into swaps to hedge risk from financing transactions infrequently and have relatively low notional volume swap books.<sup>88</sup> As was the case when the Commission provided an exception for the small banks, farm credit system institutions, and credit unions under regulation 50.50(d), the CDFI Coalition stressed the public interest benefits that will be served by permitting CDFIs to engage in tailored and limited swaps to pursue their public interest goals without incurring the costs of central clearing.

Better Markets opposed the exemption for CDFIs, as well as for bank holding companies, and savings and loan holding companies, as unnecessary and detrimental to the derivatives reforms of the Dodd-Frank Act. Better Markets stated that under section 2(h)(7)(C)(ii) the CFTC may consider excluding only certain categories of financial entities and that Congress intended to insure financial institutions broadly mitigate risks through the derivatives clearing system.<sup>89</sup> Better Markets is concerned that these exemptions will permit swaps activities to occur outside of regulated, transparent, impartially access markets, and will draw liquidity away from markets.<sup>90</sup>

---

<sup>87</sup> CDFI Coalition Letter at 6.

<sup>88</sup> *Id.* The CDFI Coalition confirmed the swap data used in the proposed rule is correct: eight different CDFIs entered into 13 uncleared interest rate swaps in 2018 with an aggregate notional value of almost \$84 million.

<sup>89</sup> Better Markets comment at 4-5.

<sup>90</sup> *Id.* at 6-7.

The Commission disagrees with Better Markets' view that the proposed exemption for CDFI is not permitted because Congress did not include CDFIs under section 2(h)(7)(C)(ii) of the CEA. As discussed further in Section V, below, Congress did not exclude section 2(h) from the Commission's statutory authority under section 4(c) of the CEA if the Commission finds an exemption from the Clearing Requirement to be in the public interest.

CDFIs are sufficiently similar to the type of entities Congress included when it directed the Commission to consider an exemption from the Clearing Requirement for small banks and savings associations.<sup>91</sup> CDFIs certified by the CDFI Fund serve rural and urban low-income communities across the nation that lack adequate access to affordable financial products and services.<sup>92</sup> Through financial assistance and grants from the CDFI Fund, CDFIs are able to make loans and investments, and to provide related services for the benefit of designated investment areas, target populations, or both.<sup>93</sup> CDFIs enter into a limited number of interest rate swaps and forward rate agreement swaps in order to hedge interest rate risk incurred as a result of issuing debt securities or making loans in pursuit of their organizational missions.<sup>94</sup>

The CDFI Coalition requested that the Commission clarify that regulation 50.77(b)(1) applies equally to both fixed-to-floating and floating-to-fixed interest rate

---

<sup>91</sup> See 77 FR at 42578. The Commission notes that uncleared swaps with a counterparty that is subject to the CEA and Commission regulations with regard to that transaction must still comply with the CEA and Commission regulations as they pertain to uncleared swaps, *e.g.*, the recordkeeping and reporting requirements under parts 23 and 45 of the Commission's regulations.

<sup>92</sup> See also Community Development Financial Institutions Fund, Notice of Funds Availability, 83 FR 4750 (Feb. 1, 2018) (stating the priorities of the CDFI Fund). In the event certification is not maintained, a CDFI would no longer meet the definition and would no longer be able to rely on this exemption from the Clearing Requirement.

<sup>93</sup> See Community Development Financial Institutions Program, 68 FR 5704, 5704 (Feb. 4, 2003). Additional information is available at the CDFI Fund's website, <https://www.cdfifund.gov/about/Pages/default.aspx>.

<sup>94</sup> CDFI Coalition comment at 5-6; Better Markets comment at 6.

swaps. The Commission confirms that the regulation is intended to apply to both fixed-to-floating and floating-to-fixed interest rate swaps, and that both formulations are included within the fixed-to-floating swap class that is subject to the Clearing Requirement according to the specifications outlined in Table 1a to Commission regulation §50.4(a).<sup>95</sup> Given that the same language is used elsewhere in part 50 to describe the fixed-to-floating interest rate swap class, the Commission declines to amend regulation §50.77(b)(1). However, the Commission confirms that both fixed-to-floating and floating-to-fixed interest rate swaps are covered by regulation §50.77 for swaps entered into by CDFIs.

The Commission also believes that the conditions set forth in proposed regulation §50.77(b)(1) through (5) are consistent with the conditions under regulation §50.50(d). By limiting the product scope to U.S. dollar interest rate swaps in the fixed-to-floating swap class and forward rate agreement class, the Commission is recognizing the need for CDFIs to hedge or mitigate interest rate risk created by the loans, investments, and financial services provided to their target populations. In addition, limiting the total aggregate notional value of all swaps and forward rate agreements entered into during the 365 calendar days prior to the day of execution to less than or equal to \$200,000,000 ensures that the swaps are being used to hedge or mitigate commercial risk. In that same regard, the requirement that a given CDFI enter into ten or fewer swaps over the course of 365 calendar days will prevent these entities from arbitrarily increasing the number of

---

<sup>95</sup> Although the language in new regulation §50.77(b)(1) and Commission regulation §50.4 is written as applying to an interest rate swap in the “fixed-to-floating class” this does not mean that the provision applies only to swaps if the first leg is a fixed rate and the second leg is a floating rate. As the Commission explained when it determined that the class of “fixed-to-floating swaps” should be subject to the Clearing Requirement, a fixed-to-floating swap is a swap in which the payment or payments owed for one leg of the swap is calculated using a fixed rate and the payment or payments owed for the other leg are calculated using a floating rate. 2012 Clearing Requirement Determination at 74302. This description from the 2012 Clearing Requirement Determination helps to explain why it is unnecessary to list fixed-to-floating swaps and floating-to-fixed swaps separately; these two phrases are referring to the same swaps (*i.e.*, one leg is a fixed rate and one leg is a floating rate, regardless of which leg is characterized as the first leg).

swaps into which they enter. Lastly, the reporting requirement will permit the Commission to verify that the exemption is being used in the manner intended.

The Commission did not receive any comments on the proposed conditions set forth in proposed rule 50.77(b)(2) through (5), and is adopting those conditions as proposed.

*H. Exemption from the Clearing Requirement for Bank Holding Companies – § 50.78(b) and Savings and Loan Holding Companies – § 50.79(b)*

As described above, the Commission proposed to codify the 2016 staff no-action letter extending relief from the Clearing Requirement to certain bank holding companies and savings and loan holding companies that otherwise would have qualified for the exception for small banks and savings associations under regulation 50.50(d).<sup>96</sup> In response to this proposal, the Commission received one comment from the American Bankers Association stating its support,<sup>97</sup> and as discussed above, one comment letter from Better Markets generally opposing the proposed exemptions.

Better Markets states that section 2(h)(7)(C)(ii) of the CEA does not cover bank holding companies or savings and loan holding companies and that if Congress intended to authorize such an exemption, it would have done so explicitly.<sup>98</sup> The Commission disagrees with Better Markets that the exemptions for bank holding companies and savings and loan holding companies are not permitted because the entities are not specifically listed under section 2(h)(7)(C)(ii) of the CEA. Bank holding companies and

---

<sup>96</sup> In CFTC Letter No. 16-01, subject to certain conditions, bank holding companies and savings and loan holding companies are permitted to elect the exception from the Clearing Requirement under Commission regulation §50.50(d) as if the bank holding company or savings and loan holding company were a bank or savings association having no more than \$10 billion in assets.

<sup>97</sup> American Bankers Association comment, at 2. The American Bankers Association's comment also expressed the position that all financial entities, apart from swap dealers and major swap participants, should be exempted from the Clearing Requirement. This comment is beyond the scope of this rulemaking.

<sup>98</sup> Better Markets comment at 5-6.



savings and loan holding companies with consolidated assets of no more than \$10 billion are sufficiently similar to the type of entities Congress was considering when it directed the Commission to consider an exemption from the Clearing Requirement for small banks.<sup>99</sup> Because Congress allowed the Commission to exempt small banks and small savings and loan associations with assets of no more than \$10 billion from the Clearing Requirement, it follows that the parent companies of such small entities, when subject to the same size limit, should be eligible for a similar exemption from the Clearing Requirement under an appropriate exercise of the Commission’s exemptive authority under section 4(c).

Bank holding companies and savings and loan holding companies generally enter into interest rate swaps to hedge interest rate risk that they incur as a result of making loans or issuing debt securities, the proceeds of which are generally used to finance their subsidiaries, which are themselves small financial institutions exempt from the Clearing Requirement under regulation 50.50(d), renumbered as Commission regulation §50.53. These entities enter into swaps to hedge risk from financing transactions infrequently and have relatively low notional volume swap books. These entities also pose less counterparty credit risk insofar as they generally enter into swaps with a notional amount of \$10 million or less.<sup>100</sup> As discussed further below, commenters relied on data in the supplemental proposal regarding the number of swaps entered into by eligible bank holding companies and savings and loan holding companies to complete their own analyses related to swap market effects of the proposal.<sup>101</sup>

---

<sup>99</sup> In the preamble to the 2012 End-User Exception final rule, the Commission determined that small banks and small savings associations were not “financial entities” for purposes of the Clearing Requirement. 77 FR at 42578.

<sup>100</sup> See August 2018 Proposal, 83 FR at 44005; see also CFTC Letter No. 16-01 at 3.

<sup>101</sup> See Better Markets comment at 6 (stating that the data shows the proposal “would not dramatically shift swaps current trading away from the Dodd-Frank Act’s clearing and multilateral trading framework, it

Regulation §§50.78(b)(2) and 50.79(b)(2) require that the information described in paragraph (b) of Commission regulation §50.50 be reported to a swap data repository. Commission regulation §50.50(b) requires that the electing counterparty notify the Commission of how it generally meets its financial obligations associated with its non-cleared swaps. This reporting requirement is needed in order to verify that the exemption from the Clearing Requirement is being used in the manner intended by the Commission and the exception is not being misused.<sup>102</sup>

Regulation §§50.78(b)(3) and 50.79(b)(3) also require that only swaps used to hedge or mitigate commercial risk, as defined under paragraph (c) of Commission regulation §50.50, may be exempt from the Clearing Requirement. This limitation appropriately reflects how these entities use swaps and also responds to Better Market's comment that the Commission does not have the authority to exempt swaps entered into by bank holding companies and savings and loan holding companies from the Clearing Requirement.<sup>103</sup>

Congress saw the benefit in exempting small banks, savings associations, farm credit system institutions, and credit unions from the Clearing Requirement when it allowed the Commission to consider such an exemption. The Commission issued such an exemption in the 2012 End-User Exception provided that such swaps are used for hedging and not speculation and are reported to a swap data repository.<sup>104</sup> Since 2016, by

---

nevertheless would permit more than \$200 million of swaps activities to occur outside of regulated, transparent, impartially accessed markets.”) *See also* 85 FR at 27965 (noting that between January 1, 2018, and December 31, 2018, eleven bank holding companies executed 18 interest rate swaps with an aggregate notional value of \$152.5 million. Seven of those bank holding companies entered into more than one swap during the calendar year 2018.).

<sup>102</sup> 2012 End-User Exception, 77 FR at 42565. *See* Section 2(h)(7)(F) of the CEA; Regulation §50.10.

<sup>103</sup> *See* August 2018 Proposal, 83 FR at 44006.

<sup>104</sup> *See* Section 2(h)(7)(A) of the CEA. The Commission notes that uncleared swaps with a counterparty that is subject to the CEA and Commission regulations with regard to that transaction must still comply with the CEA and Commission regulations as they pertain to uncleared swaps, *e.g.*, the recordkeeping and reporting requirements under parts 23 and 45 of the Commission's regulations.

virtue of a staff no-action letter, small bank holding companies and savings and loan holding companies have been permitted to elect the exemption under regulation §50.50(d) on behalf of their underlying small bank or savings and loan. In the intervening four years, the Commission has not discovered or been made aware of any abuse of this no-action letter. Accordingly, the Commission believes that the extension of the 2012 End-User Exception's exemption for small banks to bank holding companies and savings and loan holding companies subject to this new regulation is appropriate and consistent with Congressional intent. The Commission is adopting regulation §§50.78 and 50.79 as proposed.

*I. Data Related to Swaps of CDFIs, Bank Holding Companies, and Savings and Loan Holding Companies*

As the Commission did in the May 2020 Proposal, it is including a discussion of data related to past swaps activity to provide context for this final rule. All interest rate swaps data included in this section was reported to DDR as events-based data and was analyzed by Commission staff.<sup>105</sup>

During the time period between January 1, 2018, and December 31, 2018, eight different CDFIs entered into interest rate swaps and four of those entities entered into more than one swap. Over this one year, CDFIs entered into thirteen uncleared interest rate swaps with an aggregate notional value of almost \$84 million. According to this data, more CDFIs entered into uncleared interest rate swaps during the calendar year 2018 than during the previous 18-month time period between January 2017 and June

---

<sup>105</sup> This section does not include credit default swaps data because the relief provided to CDFIs does not extend to credit default swaps and there has been no credit default swaps activity by eligible bank holding companies or savings and loan holding companies in the time periods analyzed.

2018.<sup>106</sup> At the same time, the aggregate notional value of all uncleared interest rate swaps entered into during calendar year 2018 (\$83.9 million) was less than the aggregate notional value of swaps entered into by CDFIs during the 18-month time period between January 2017 and June 2018 (\$251.6 million). The CDFI Coalition agreed with the data presented by the Commission in the May 2020 Proposal related to CDFI swaps activities.<sup>107</sup>

Similarly, the Commission provided data in the May 2020 Proposal regarding the number of swaps entered into by eligible bank holding companies and savings and loan holding companies. Between January 1, 2018 and December 31, 2018, eleven bank holding companies executed 18 interest rate swaps with an aggregate notional value of \$152.5 million.<sup>108</sup> Seven of these bank holding companies entered into more than one swap during the calendar year 2018. In calendar year 2018 the aggregate notional value of all swaps entered into by eligible bank holding companies increased substantially (\$152.5 million in 2018 compared to \$68.6 million in 2017), but this increase was also the result of more eligible bank holding companies entering into uncleared interest rate swaps.

Based on this data, Better Markets concluded that the scope of the exemptions was limited and not likely to dramatically shift the level of swap clearing pursuant to the Clearing Requirement.<sup>109</sup> The data, together with the market observations and statements

---

<sup>106</sup> During an earlier 18-month time period, between January 1, 2017 and June 29, 2018, three CDFIs executed interest rate swaps: One executed two swaps with an aggregate notional value of \$5.6 million; another executed three swaps with an aggregate notional value of \$116 million; and another executed three swaps with an aggregate notional value of \$130 million.

<sup>107</sup> CDFI Coalition comment at 5-6.

<sup>108</sup> During the previous year, between January 1, 2017 and December 31, 2017, one bank holding company executed ten interest rate swaps with an aggregate notional value of \$43.6 million, and a second bank holding company executed one interest rate swap with a notional value of \$25 million.

<sup>109</sup> Better Markets comment at 6.

by commenters, demonstrates that these entities have an ongoing interest in entering into uncleared swaps and likely will benefit from the Commission's codification of the relief currently afforded under CFTC staff letters.

*J. Adoption of Subpart D of Part 50*

The creation of subpart D is part of an effort to distinguish exemptions that apply to specific swaps from the exceptions and exemptions for market participants eligible to elect an exception or exemption under subpart C of Part 50. This distinction is important because the exemptions for swaps under subpart D are not eligible for an exemption from margin for uncleared swaps, as discussed further below. Additionally, some of the exemptions for swaps are more limited and, in some cases, have additional conditions.

The exemptions in subpart D are intended to be consistent with the Commission's determinations set forth in the 2012 End-User Exception and do not limit the applicability of any CEA provision or Commission regulation to any person or transaction, except as provided in this final rulemaking. The exemptions in subpart D will include transactions with central banks, sovereign entities, IFIs, bank holding companies, savings and loan holding companies, and CDFIs, as defined in the regulations. The same policy reasons that the Commission considered when exempting these institutions in the 2012 End-User Exception final rule support the adoption of subpart D.

**III. Clearing Requirement Compliance Schedule and Compliance Dates**

The Commission implemented the Clearing Requirement through two separate rulemakings: (i) the 2012 Clearing Requirement Determination; and (ii) the 2016 Clearing Requirement Determination. Under each of these final rules, the Commission made the decision to phase-in the compliance requirement. Neither clearing requirement determination required compliance by all market participants for all swaps included in Commission regulation §50.4 on a single date. The Commission proposed to improve

transparency and to provide the information about compliance dates for both the 2012 Clearing Requirement and the 2016 Clearing Requirement in one location that would be convenient for market participants to reference.

The Commission did not receive any comments on proposed regulation §50.26. The compliance schedule is adopted as proposed.

#### **IV. Technical Amendment to Subpart C for Banks, Savings Associations, Farm Credit System Institutions, and Credit Unions – § 50.53**

The Commission proposed technical amendments to subpart C of part 50 to reorganize the subpart by re-codifying the existing regulatory provision for certain banks, savings associations, farm credit system institutions, and credit unions to create a new numbered section and heading, proposed regulation §50.53. The Commission believed that a stand-alone regulation for this exemption would facilitate swap counterparties' use and understanding of Part 50 of the Commission's regulations by separating this exemption from the non-financial entities' exception.

The Commission views this as a non-substantive change, and the minor changes to the text of the regulations serve to clarify and update the requirements in light of current swap reporting conventions, specifically related to swap data reporting by entities eligible for an exception or exemption from the Clearing Requirement. The Commission did not receive any comments on the proposed changes. The change is adopted as proposed, and the Commission is changing cross-references to Commission regulation §50.50(d) to new regulation §50.53 throughout part 50.

#### **V. Commission's Section 4(c) Authority**

Section 4(c) of the CEA provides the Commission with the authority to exempt certain transactions from the requirements of the CEA if the Commission determines that the exemption is consistent with the public interest. Section 4(c)(1) of the CEA

authorizes the Commission to “promote responsible economic or financial innovation and fair competition” by exempting any transaction or class of transactions, including swaps, from any of the provisions of the CEA (subject to exceptions not relevant here).<sup>110</sup> In enacting CEA section 4(c)(1), Congress noted that the goal of the provision “is to give the Commission a means of providing certainty and stability to existing and emerging markets so that financial innovation and market development can proceed in an effective and competitive manner.”<sup>111</sup>

Section 4(c)(2) of the CEA further provides that the Commission may not grant exemptive relief unless it determines that: (A) the exemption is consistent with the public interest and the purposes of the CEA; and (B) the transaction will be entered into solely between “appropriate persons” and the exemption will not have a materially adverse effect on the ability of the Commission or any contract market to discharge its regulatory or self-regulatory responsibilities under the CEA.<sup>112</sup> Section 4(c)(3) of the CEA includes within the term “appropriate person” a number of specified categories of persons, including any governmental entity (including the United States, any state, or any foreign government) or political subdivision thereof, or any multinational or supranational entity or any instrumentality, agency, or department of any of the foregoing,<sup>113</sup> banks,<sup>114</sup>

---

<sup>110</sup> Pursuant to section 4(c)(1) of the CEA, in order to promote responsible economic or financial innovation and fair competition, the Commission by rule, regulation, or order, after notice and opportunity for hearing, may (on its own initiative or on application of any person) exempt any agreement, contract, or transaction (or class thereof) that is otherwise subject to subsection (a) of section 4(c)(1), either unconditionally or on stated terms or conditions, or for stated periods and either retroactively or prospectively, or both, from any of the requirements of subsection (a) of CEA section 4(c), or from any other provision of the CEA. The Commission is finalizing these exemptive rules pursuant to sections 4(c)(1) and 8a(5) of the CEA.

<sup>111</sup> H.R. Rep. No. 102–978, 102d Cong. 2d Sess. at 81 (Oct. 2, 1992), *reprinted in* 1992 U.S.C.C.A.N. 3179, 3213.

<sup>112</sup> Section 4(c)(2) of the CEA.

<sup>113</sup> Section 4(c)(3)(H) of the CEA.

<sup>114</sup> Section 4(c)(3)(A) of the CEA.

savings associations,<sup>115</sup> and such other persons that the Commission determines to be appropriate in light of their financial or other qualifications, or the applicability of appropriate regulatory protections.<sup>116</sup>

The Commission requested comment regarding whether the proposed amendments would be an appropriate exercise of the Commission’s authority under section 4(c) of the CEA, including whether the proposal promotes the public interest.<sup>117</sup> The Commission also requested comment on whether there are any entities that would not be “appropriate persons” under section 4(c)(3) of the CEA, and on whether the Proposals provide certainty and stability to existing and emerging markets so that financial innovation and market development can proceed in an effective and competitive manner.<sup>118</sup>

The Commission received one comment generally opposing the Commission’s exercise of its authority under section 4(c) to exempt from the Clearing Requirement swaps entered into with CDFIs, bank holding companies, and savings and loan holding companies, but the commenter stated that the Commission was correct to condition the exemptions to limit their scope and provide oversight of financial institutions relying on the exemptions.<sup>119</sup> The Commission did not receive any comment on its proposed exercise of its authority under section 4(c) to exempt from the Clearing Requirement swaps entered into with central banks, sovereign entities, and IFIs. As discussed in detail above, the Commission believes that the exemptions from the Clearing Requirement for swaps entered into by central banks, sovereign entities, IFIs, banks holding companies,

---

<sup>115</sup> Section 4(c)(3)(B) of the CEA.

<sup>116</sup> Section 4(c)(3)(K) of the CEA.

<sup>117</sup> May 2020 Proposal, 85 FR at 27966; August 2018 Proposal, 83 FR at 44008.

<sup>118</sup> *Id.*

<sup>119</sup> Better Markets comment at 5.



savings and loan holding companies, and CDFIs are a proper exercise of its exemptive authority under section 4(c) of the CEA.

*A. Central Banks, Sovereign Entities, and IFIs*

The Commission believes that it is consistent with the public interest and the purposes of the CEA to exempt from the Clearing Requirement swaps entered into with central banks, sovereign entities, and certain IFIs under its broad exemption authority under section 4(c) of the CEA. In 2012, the Commission established a policy that transactions with central banks, sovereign entities (then referred to as foreign governments), and certain IFIs should be exempt from the Clearing Requirement on the basis of comity and in keeping with the traditions of the international system. The Commission continues to believe, as it did in 2012, that based on the canons of statutory construction and considerations of comity, and in keeping with the traditions of the international system, sovereign entities and central banks should not be subject to section 2(h)(1) of the CEA.<sup>120</sup> With respect to IFIs, these entities serve an important public policy purpose. The member governments of IFIs generally have majority control and governance over these entities. The Commission therefore continues to believe that an exemption is appropriate because, in a real sense, an IFI is not separable from its government owners. Codifying the Commission's 2012 policy determination through a section 4(c) exemption provides clarity and certainty for market participants.<sup>121</sup>

---

<sup>120</sup> The Commission continues to believe that transactions with sovereign wealth funds or similar entities should not be exempt from the Clearing Requirement because these entities generally act as investment funds. *See* 2012 End-User Exception, 77 FR at 42562, n.18 (noting that the foregoing rationale and considerations do not, however, extend to sovereign wealth funds or similar entities due to the predominantly commercial nature of their activities).

<sup>121</sup> As with the other exemptions from the Clearing Requirement, the Commission reminds the counterparties that these swaps exempted from the Clearing Requirement by this final rule and the existing 2012 determination must be reported to a swap data repository.

The amendments to exempt swaps entered into by central banks, sovereign entities, and certain IFIs from the Clearing Requirement are available only to “appropriate persons” under section 4(c)(3)(H) of the CEA. No commenter disputed that these entities are “appropriate persons” under section 4(c)(3)(H) of the CEA, which states that any governmental entity (including the United States, any state, or any foreign government), or political subdivision thereof, or any multinational or supranational entity or any instrumentality, agency, or department of any of the foregoing.

The Commission also notes that these entities are considered ECPs as set forth in section 1a(18)(A)(vii) of the CEA. Given that only ECPs are permitted to enter into uncleared swaps, and that the ECP definition is generally more restrictive than the comparable elements of the “appropriate persons” definition of section 4(c)(3)(H) of the CEA, the Commission believes that there is no risk that the exemption could be used by any entity other than an ECP or “appropriate person.” Accordingly, the class of persons eligible to rely on regulation §§50.75 and 50.76 is limited to appropriate persons within the scope of section 4(c) of the CEA.

Additionally, the Commission notes that the applicable central banks, sovereign entities and IFIs have been relying on the language in the preamble to the 2012 End-User Exception and the DCR no-action letters for many years. The Commission is not aware of any increase in counterparty risk attributable to the affected entities’ reliance on the 2012 preamble language and the staff no-action letters.

Finally, the exemptions for swaps entered into with central banks, sovereign entities, and certain IFIs will not have a materially adverse effect on the ability of the Commission to discharge its regulatory responsibilities under the CEA. The exemptions from the Clearing Requirement are limited to swaps entered into with specific central banks, sovereign entities, and IFIs and do not limit the applicability of any other CEA

provision or Commission regulation except as discussed above. The Commission will continue to have access to information regarding the exempted swaps because the non-electing counterparty to the swap must report the swap to a swap data repository.

Uncleared swaps with a counterparty that is otherwise subject to the CEA and Commission regulations with regard to such swaps must comply with the CEA and Commission regulations as they pertain to uncleared swaps. Additionally, the Commission retains its special call, anti-fraud, and anti-evasion authorities, which enables the Commission to adequately discharge its regulatory responsibilities under the CEA.

*B. CDFIs, Certain Bank Holding Companies, and Savings and Loan Holding Companies*

The Commission believes it is consistent with the public interest and the purposes of the CEA to exempt from the Clearing Requirement swaps entered into by CDFIs, bank holding companies, and savings and loan holding companies under section 4(c) of the CEA. The Commission believes that the same policy reasons that Congress considered in directing the Commission to consider exempting swaps entered into with small financial institutions (small banks, savings associations, farm credit system institutions, and credit unions) from the financial entity definition, making them eligible for the End-User Exception of section 2(h)(7)(c)(ii) of the CEA, support an exemption for swaps entered into by CDFIs, bank holding companies, and savings and loan holding companies.<sup>122</sup>

In the 2012 End-User Exception, the Commission determined that the small financial institutions should be excepted from the financial entity definition because these entities tend to serve smaller, local markets, and the swaps executed by the small

---

<sup>122</sup> See 2012 End-User Exception, 77 FR at 42578. These entities are not eligible to elect the End-User Exception under Commission regulation §50.50, and they remain financial entities under the definition of financial entity of section 2(h)(7)(C) of the CEA.

financial institutions likely hedge interest rate risk associated with making commercial loans.<sup>123</sup> Small financial institutions typically hedge their swaps with customers by entering into matching swaps in the swap market, and if those matched swaps had to be centrally cleared, the small financial institutions would have to post margin to satisfy the requirements of the DCOs. The Commission determined that mandatory clearing could raise the costs for small financial institutions and such costs may be prohibitively high given the small number of swaps such entities execute over a given period of time.<sup>124</sup>

Swaps are an important risk management tool, and CDFIs, bank holding companies, and savings and loan holding companies should be afforded the means to hedge their capital costs economically in order to promote the public interest objectives of smaller financial institutions serving smaller, local markets. Commenters agreed with the Commission that the swaps entered into by CDFIs, bank holding companies, and savings and loan holding companies have smaller notional amounts and that these financial entities use swaps infrequently.<sup>125</sup> While the Commission recognizes that these entities may enter into more swaps to hedge against rising interest rates, the conditions on the exemption make it unlikely that the volume of swaps entered into by these entities will reach a systemic level.

These exemptions from the Clearing Requirement may serve to promote responsible financial innovation and fair competition due to the substantial fixed costs associated with clearing swaps. The cost of clearing on a per-swap basis cannot be supported by the small number of trades into which the entities eligible to elect these exemptions enter. While the Commission did not receive any comments on the cost of

---

<sup>123</sup> 2012 End-User Exception, 77 FR at 42578.

<sup>124</sup> *Id.*

<sup>125</sup> See CDFI Coalition comment at 6; Better Markets comment at 6 (acknowledging that the scope of the exemption is limited and will not dramatically shift transactions away from clearing).

clearing, the Commission notes that in 2012, the cost estimate for small financial institutions included between \$2,500 and \$25,000 in legal fees related to reviewing and negotiating clearing-related documents, and a minimum of between \$75,000 and \$125,000 per year on fees paid to each futures commission merchant with which it maintains a relationship.<sup>126</sup> The Commission believes an exemption from the Clearing Requirement for CDFIs, bank holding companies, and savings and loan holding companies will lower costs, which enables these entities to better manage their financing risks and provide cost-effective loans to their subsidiaries, as well as to small and middle market businesses. In addition, this exemption from the Clearing Requirement may support commercial lending and depository activities of the holding company's subsidiaries.

The Commission believes that the specific amendments to exempt swaps entered into by CDFIs, bank holding companies, and savings and loan holding companies from the Clearing Requirement are available to only "appropriate persons." Under section 4(c)(3)(A) and (B) of the CEA, "appropriate person" includes a bank or a trust, and a savings association. The extension of the term "appropriate person" to include CDFIs, bank holding companies, and savings and loan holding companies aligns with the statute's determination that banks and savings associations are "appropriate persons." The Commission did not receive any comments on whether these entities are "appropriate persons."

The bank holding companies, savings and loan holding companies, and CDFIs eligible to elect these exemptions are ECPs pursuant to section 1a(18)(A)(i) of the CEA.<sup>127</sup> Given that only ECPs are permitted to enter into uncleared swaps, and that the

---

<sup>126</sup> 2012 End-User Exception, 77 FR at 42577 n.74.

<sup>127</sup> August 2018 Proposal, 83 FR at 44008.

ECP definition is generally more restrictive than the comparable elements of the enumerated “appropriate person” definition, there is no risk that a non-ECP or a person who does not satisfy the requirements for an “appropriate person” could enter into an uncleared swap using these exemptions from the Clearing Requirement. Accordingly, the Commission believes that the class of persons eligible to rely on the exemptions codified in new regulation §§50.75 through 50.79 will be limited to “appropriate persons” within the scope of section 4(c) of the CEA.

The Commission notes that the CDFIs, bank holding companies, and savings and loan holding companies have been relying on the DCR no-action letters since 2016. The Commission is not aware of any increase in counterparty risk attributable to affected entities’ reliance on the staff no-action letters, and commenters did not point to any instances of increased counterparty risk. These exemptions from the Clearing Requirement are limited in scope, and the Commission will continue to have access to information regarding the swaps subject to these exemptions because such swaps will be reported to a swap data repository by one of the counterparties to the swap.<sup>128</sup>

The Commission further notes that the exemptions are intended to be consistent with the Commission’s policy determinations set forth in the 2012 End-User Exception with respect to the exception from the Clearing Requirement for small financial institutions, and do not limit the applicability of any CEA provision or Commission regulation to any person or transaction except as provided in this final rulemaking. In addition, the Commission retains its special call, anti-fraud, and anti-evasion authorities, which will enable it to adequately discharge its regulatory responsibilities under the CEA. The Commission therefore believes the exemptions will not have a materially adverse

---

<sup>128</sup> Uncleared swaps with a counterparty that is subject to the CEA and Commission regulations with regard to such swaps are required to comply with the CEA and Commission regulations, including data reporting and uncleared margin rules.

effect on the ability of the Commission to discharge its regulatory responsibilities under the CEA.

For the reasons discussed above, it is appropriate and consistent with the public interest to adopt new regulation §§50.75 through 50.79 as set forth in subpart D.

## **VI. Final Rules Do Not Effect Margin Requirements for Uncleared Swaps**

In the Proposals, the Commission explained that these exemptions, if finalized, would not affect the Commission's margin requirements for uncleared swaps.<sup>129</sup> The Commission did not receive any comments on the effect of the exemptions on the Commission's margin requirements for uncleared swaps.

The Commission affirms its position as set forth in the Proposals. Under Commission regulation §23.150(b)(1), the margin requirements for uncleared swaps under part 23 of the Commission's regulations do not apply to a swap if the counterparty qualifies for an exception from clearing under section 2(h)(7)(A) and implementing regulations.<sup>130</sup> Commission regulation §23.150(b) was added to the final margin rules after the Terrorism Risk Insurance Program Reauthorization Act of 2015 (TRIPRA)<sup>131</sup> amended section 731 of the Dodd-Frank Act by adding section 4s(e)(4) to the CEA to provide that the initial and variation margin requirements will not apply to an uncleared swap in which a non-financial entity (including a small financial institution and a captive finance company) qualifies for an exception under section 2(h)(7)(A) of the CEA, as well as two exemptions from the Clearing Requirement that are not relevant in this context.<sup>132</sup>

---

<sup>129</sup> May 2020 Proposal, 85 FR at 27966, August 2018 Proposal, 83 FR at 44008 (citing to relevant margin for uncleared swaps provisions in Commission regulation §23.150(b)(1)).

<sup>130</sup> Commission regulation §23.150(b)(1).

<sup>131</sup> Pub. L. 114-1, 129 Stat. 3.

<sup>132</sup> Commission regulation §23.150(b)(2) provides that certain cooperative entities that are exempt from the Commission's clearing requirement pursuant to section 4(c)(1) authority also are exempt from the initial and variation margin requirements. None of the entities included in this proposal is a cooperative that

The final rules are not implementing section 2(h)(7)(A) of the CEA. Instead, the Commission, pursuant to its 4(c) authority (as discussed above), is exempting swaps entered into by central banks, sovereign entities, IFIs, bank holding companies, savings and loan holding companies, and CDFIs from the Clearing Requirement. The Commission is not excluding these entities from the “financial entity” definition of section 2(h)(7)(C) of the CEA. Therefore, these entities are not eligible to elect the End-User Exception under Commission regulation §50.50, and they remain financial entities under the definition of financial entity of section 2(h)(7)(C) of the CEA. For these reasons, the new regulation §§50.75 through 50.79 do not implicate any of the provisions of section 4s(e)(4) of the CEA or Commission regulation §23.150.<sup>133</sup>

## **VII. Related Matters**

### *A. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) requires Federal agencies to consider whether the regulations they propose will have a significant economic impact on a substantial number of small entities and, if so, provide a regulatory flexibility analysis on the impact.<sup>134</sup> The Commission previously has established certain definitions of small entities to be used in evaluating the impact of its regulations on small entities in accordance with the RFA.<sup>135</sup> As discussed in the Proposals, the final regulations do not affect any small entities as that term is used in the RFA. The regulations will affect specific counterparties to an uncleared swap, namely, central banks, sovereign entities,

---

would meet the conditions in Commission regulation §23.150(b)(2). In addition, the regulation §23.150(b)(3), which pertains to affiliated entities, does not apply in this context.

<sup>133</sup> The Commission believes that the final rules do not affect the margin rules for entities that are supervised by the prudential regulators. The prudential regulators’ rules contain provisions that are identical to Commission regulation §23.150. *See* Margin and Capital Requirements for Covered Swap Entities, 80 FR 74916, 74923 (Nov. 20, 2015).

<sup>134</sup> 5 U.S.C. 601 *et seq.*

<sup>135</sup> 47 FR 18618 (Apr. 30, 1982).



IFIs, bank holding companies, savings and loan holding companies, and CDFIs. Pursuant to sections 2(e) and 5(d)(11)(A) of the CEA, only ECPs may enter into uncleared swaps.<sup>136</sup> As discussed above, the entities whose transactions are covered by these exemptions from the Clearing Requirement are ECPs.<sup>137</sup> The Commission has stated previously that ECPs, by the nature of the definition, should not be considered small entities for RFA purposes.<sup>138</sup> Because ECPs are not small entities, and persons not meeting the definition of ECP may not conduct transactions in uncleared swaps, the Commission need not conduct a regulatory flexibility analysis respecting the effect of these rules on ECPs.

The Commission received no comments on the RFA discussions in the May 2020 Proposal or the August 2018 Proposal. Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the final regulations will not have a significant economic impact on a substantial number of small entities.

*B. Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (PRA)<sup>139</sup> imposes certain requirements on Federal agencies, including the Commission, in connection with their conducting or sponsoring any collection of information, as defined by the PRA. In the Proposals, the Commission determined that these regulations would not impose a new collection of any information or any new recordkeeping requirements on any persons and would not

---

<sup>136</sup> Section 2(e) of the CEA limits non-ECPs to executing swap transactions on a board of trade designated as a contract market (DCM) and section 5(d)(11)(A) of the CEA requires all DCM transactions to be cleared. Accordingly, the two provisions read together permit only ECPs to execute uncleared swap transactions.

<sup>137</sup> See Section 1a(18)(A)(i) and 1a(18)(A)(vii) of the CEA.

<sup>138</sup> See *Opting Out of Segregation*, 66 FR 20740, 20743 (Apr. 25, 2001).

<sup>139</sup> 44 U.S.C. 3501 *et seq.*

require approval of the Office of Management and Budget (OMB) under the PRA.<sup>140</sup>

The Commission received no comments on these determinations. As such, the final rules do not impose any new burden or any new information collection requirements in addition to those that already exist pursuant to Commission regulations.

### *C. Cost-Benefit Considerations*

As discussed in detail above, the Commission is amending its regulations to add new regulation §§50.75 through 50.79, as set forth in subpart D, to exempt swaps entered into with central banks, sovereign entities, IFIs, certain bank holding companies, savings and loan holding companies, and CDFIs from the Clearing Requirement consistent with the policies set forth in the 2012 End-User Exception and subsequent staff no-action letters.<sup>141</sup> Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before promulgating regulations under the CEA or issuing certain orders.<sup>142</sup> Section 15(a) further specifies that the costs and benefits shall be evaluated in light of the following five broad areas of market and public concern: (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations (collectively referred to as the Section 15(a) Factors).

#### *1. Consideration of the Costs and Benefits of the Commission's Action*

The baseline for the Commission's consideration of the costs and benefits of this final rulemaking is the existing statutory and regulatory framework of section 2(h)(1) of

---

<sup>140</sup> The applicable collection of information is "Swap Data Recordkeeping and Reporting Requirements," OMB control number 3038-0096. Parties wishing to review the CFTC's information collections may do so at [www.reginfo.gov](http://www.reginfo.gov), at which OMB maintains an inventory aggregating each of the CFTC's currently approved information collections, as well as the information collections that presently are under review.

<sup>141</sup> The other non-substantive amendments made to part 50 do not affect the cost-benefit considerations of this rulemaking.

<sup>142</sup> Section 15(a) of the CEA.

the CEA and part 50 under which any swap subject to the Clearing Requirement would be required to be cleared by central banks, sovereign entities, IFIs, bank holding companies, savings and loan holding companies, and CDFIs. The regulatory baseline, however, has been affected by Commission statements in the 2012 End-User Exception and CFTC no-action letters, which have been relied on by central banks, sovereign entities, IFIs, bank holding companies, savings and loan holding companies, CDFIs, and their counterparties when entering into swaps that otherwise would be subject to the Clearing Requirement. The final regulations in this adopting release largely codify the current practice that has been in place since 2012. The Commission recognizes that the actual costs and benefits of the final rules as realized in the market may not be as significant as compared to that regulatory baseline. The Commission endeavors to assess the expected costs and benefits of the final rules in quantitative terms where possible. Where estimation or quantification is not feasible, the Commission discusses the costs and benefits in qualitative terms.

This consideration of costs and benefits is based on an understanding that the swap markets function internationally with many transactions involving U.S. firms taking place across international boundaries. Some Commission registrants are organized outside of the United States, some leading industry members typically conduct their operations both within and outside of the United States, and some industry members follow substantially similar business practices wherever they may be located. Where the Commission does not specifically refer to matters of location, this discussion of costs and benefits refers to the effects of the final rule on all activity subject to the amended part 50 regulations, whether by virtue of the activity's physical location in the United States or by virtue of the activity's connection with or effect on U.S. commerce under section 2(i)

of the CEA.<sup>143</sup> In particular, the Commission notes that some entities affected by this rulemaking are located outside of the United States.

In the sections that follow, the Commission discusses: (1) the costs and benefits of the new part 50 exemptions to the Clearing Requirement for swaps entered into by entities that meet the definitions of central bank, sovereign entity, IFI, bank holding company, savings and loan holding company, and CDFI as set forth in these rules; and (2) the impact of such exemptions on the Section 15(a) Factors.

a. Costs

New Commission regulation §§50.75 through 50.79 exempt swaps entered into by central banks, sovereign entities, IFIs, certain bank holding companies, savings and loan holding companies, and CDFIs from the Clearing Requirement under section 2(h)(1)(A) of the CEA. In the Proposals, the Commission recognized that the protections of central clearing will not accrue to swaps entered into by these entities, which is a cost.<sup>144</sup> The Clearing Requirement is designed to mitigate the counterparty credit risk associated with swaps and, in turn, to mitigate the potential systemic impact that an accumulation of counterparty credit risk through swaps activity could cause instability in the financial system.

In general, central clearing mitigates counterparty credit risk through the substitution of the DCO as counterparty to the swap. After this novation occurs, a DCO manages risk by collecting initial margin from its clearing members for all their swap positions and collecting and paying out variation margin among its clearing members based on marking the swap positions to market prices on a daily basis. The collection of margin allows a DCO to mitigate the possibility of a clearing member or customer

---

<sup>143</sup> Section 2(i) of the CEA.

<sup>144</sup> May 2020 Proposal, 85 FR at 27968; August 2018 Proposal, 83 FR at 44009.

default, as well as to cover potential losses due to such a default. Central clearing also provides protection through a default fund that is made up of mutualized contributions from the DCO's clearing members and can be used in the case of a default by one or more of those members.

New Commission regulation §§50.75 through 50.77 exempting swaps entered into by central banks, sovereign entities, and IFIs codify the policy determination made in the Commission's 2012 End-User Exception that is based on considerations of international comity, and in keeping with the traditions of the international system. Under the final rules, swaps entered into by central banks (including BIS), sovereign entities, and IFIs are treated like swaps entered into by the Federal Reserve Banks, the Federal Government, or a Federal agency and are not subject to the Clearing Requirement. As discussed above, Congress exempted swaps entered into by the Federal entities expressly backed by the full faith and credit of the United States when it excluded any agreement, contract, or transaction entered into by these entities from the definition of a swap and consequently from the application of the Clearing Requirement.<sup>145</sup>

The costs of not subjecting swaps exempted from the Clearing Requirement under these final rules, as identified in the May 2020 Proposal, include the possibility of increased counterparty credit risk that is left unmitigated by the protections of central clearing. The costs associated with exempting swaps entered into by central banks, sovereign entities, and IFIs from the Clearing Requirement also are reflected in data showing the low notional amounts and number of such swaps.<sup>146</sup>

---

<sup>145</sup> Section 1a(47)(B)(ix) of the CEA.

<sup>146</sup> May 2020 Proposal, 85 FR at 27967-27969. *See also* discussion of data above. From January 1, 2018 to December 31, 2018, 16 IFIs named in proposed regulation §50.76 were counterparties to a swap that was entered into and reported to DDR during that time period. Overall, the 16 IFIs entered into approximately 2,500 uncleared interest rate swaps with an estimated total notional value of \$220 billion. Of those 16, four IFIs entered into more than one hundred swaps during calendar year 2018.

The Commission received no comments directly related to the costs of regulation §§50.75 through 50.77. The Commission continues to believe that swaps entered into by central banks, sovereign entities, and certain IFIs should not be subject to the Clearing Requirement, and the minimal costs associated with this determination have been taken into account. Central banks, and the sovereign entities backing those central banks, are the very entities that protect the global financial system against systemic risk. IFIs provide financing for national and regional development and are fully backed by their governmental members. As such, the swaps into which they enter do not pose the type of risk that the Clearing Requirement was intended to address.

Turning to new regulation §§50.78 and 50.79, which exempt from the Clearing Requirement swaps entered into by certain bank holding companies, savings and loan holding companies, and CDFIs, the direct cost associated with these final rules is that the exempted swaps will not be subject to the Clearing Requirement and the entities entering into the swaps will not benefit from the risk-mitigating aspects of clearing described above. Under this view, costs are measured in terms of increased risk to the counterparties to the swap and to the financial system. However, the Commission notes that, as was the case when the Commission exempted small financial institutions from the definition of “financial entity” for purposes of the codifying the end-user exception in 2012, these final regulations implementing the exemption for swaps entered into by bank holding companies, savings and loan holding companies, and CDFIs are appropriately conditioned to minimize risk.<sup>147</sup> For example, the notice and reporting requirements under regulation §§50.77(b)(4) through (5), 50.78(b)(2) through (3), and 50.79(b)(2) through (3) will afford some degree of risk mitigation because the electing entity is

---

<sup>147</sup> 2012 End-User Exception, 77 FR at 42578 (explaining the policy rationale for adopting the Clearing Requirement exception for small financial institutions and setting conditions on the exception).

required to indicate how the electing counterparty generally meets its financial obligations with regard to its uncleared swaps. These requirements also help ensure that counterparties are aware of the potential exposure each swap may have on the entity's overall risk profile.

The Commission also considered the regulatory reporting costs for bank holding companies, savings and loan holding companies, and CDFIs under new Commission regulation §§50.77(b)(4), 50.78(b)(2), and 50.79(b)(2) and concluded that the regulations do not impose any additional costs. In general, the Commission understands that in most cases reporting swaps to the swap data repository is done by swap counterparties that are swap dealers. The bank holding company, savings and loan holding company, and CDFI entities that are electing an exemption from the Clearing Requirement under these regulations would report the swaps to the swap data repository only in extremely rare cases.<sup>148</sup> Because these entities have been operating pursuant to no-action letters that have the same reporting requirements, the Commission believes that the final rules will not impose any new compliance costs on bank holding companies, savings and loan holding companies, or CDFIs.

The Commission also considered the additional cost to the financial system that could result from the imposition of the \$10 billion size threshold for bank holding companies and savings and loan holding companies eligible for the exemption and has determined that there is no additional cost associated with the imposition of a size threshold.<sup>149</sup> As noted in the 2018 Proposal, the \$10 billion cap is a bright line and, due

---

<sup>148</sup> As the Commission explains above, the election of an exemption from the Clearing Requirement by any central bank, sovereign entity, or identified IFI is not dependent on reporting the swap to a swap data repository. That obligation rests with the non-electing counterparty to the trade based upon independent obligations under part 23 or 45 of the Commission regulations.

<sup>149</sup> The Commission did not propose a size threshold for CDFIs because the Commission believes these entities generally fall under the \$10 billion size threshold.

to the nature of using a bright line as a threshold, it is possible that some entities with attributes similar to those entities whose transactions are exempted from the Clearing Requirement, may not be eligible to use the exemption from the Clearing Requirement. It is also possible that some bank holding companies or savings and loan holding companies could make operational and business decisions that would allow them to qualify to use the exemption from the Clearing Requirement. However, the Commission does not expect that an entity would limit its potential revenue in order to maintain a smaller size in order to be able to rely on this exemption. As such, the Commission believes that the \$10 billion size threshold is appropriate and will not impose additional costs on entities covered by these regulations.

The comment letter received from Better Markets raises a number of indirect and hard to quantify costs.<sup>150</sup> For example, the letter states that piecemeal exemptions and carve-outs diminish the effectiveness of the swap market regulatory reforms, result in less transparency, and fragment markets.<sup>151</sup> Furthermore, the letter notes that the trades that will remain uncleared as a result of exemptions codified in this adopting release will be intermediated bilaterally with one of a handful of already dominant derivatives dealers, which limits participation and diversity in the cleared swaps markets and results in reduced liquidity in the marketplace.<sup>152</sup> Despite these concerns, the Commission continues to believe that the conditions imposed on the swap exemptions under this adopting release limit these costs.

Finally, another mitigating factor related to the costs of not centrally clearing these exempted swaps, is that the Commission's uncleared margin requirements may

---

<sup>150</sup> Better Markets comment at 1-3.

<sup>151</sup> *Id.* at 4.

<sup>152</sup> *Id.* at 5.



apply to some of the swaps exempted under these final rules. In these instances, the costs that may result from not requiring central clearing by a DCO may be mitigated.

b. Benefits

The Commission has identified a number of benefits associated with the final regulations. The Commission notes that to the extent that market participants have been relying on Commission statements in the 2012 End-User Exception and DCR no-action letters, the actual benefits of the final rules as realized in the market may not be as significant as compared to the regulatory baseline. First, central banks, sovereign entities, IFIs, certain bank holding companies, savings and loan holding companies, and CDFIs will benefit from lower transaction costs as a result of these final exemptions from the Clearing Requirement. In terms of project financing and risk management, these entities will not face the added expense of central clearing and can put those cost savings to good use. For example, the costs savings achieved through these exemptions could allow CDFIs and IFIs to enter into more public service projects in furtherance of their missions.

There are other important benefits associated with these amendments to part 50. If the Commission were to subject foreign governments (sovereign entities), central banks, or IFIs to regulation under the CEA in connection with their swaps, foreign regulators could reciprocate with regard to the United States Federal Government, Federal Reserve Banks, or IFIs of which the United States is a member in a similar manner. The Commission expects that these swap exemptions from the Clearing Requirement will help ensure that if any of the Federal Government, Federal Reserve Banks, or IFIs of which the United States is a member were to engage in swaps in foreign

jurisdictions, the actions of those entities with respect to those transactions would not be subject to foreign regulation.<sup>153</sup>

In addition, there are benefits to the financial system from having certain bank holding companies, savings and loan holding companies, and CDFIs enter into interest rate swaps to hedge interest rate risk they incur as a result of issuing debt securities or making loans to finance their subsidiary banks or savings associations at a lower cost. For some bank holding companies and savings and loan holding companies, interest rate swaps need to be entered into by the holding company in order to gain hedge accounting treatment and promote efficiencies to benefit their subsidiaries.<sup>154</sup> Finally, the costs savings from the final regulations may result in more projects being funded in small communities where certain bank holding companies, savings and loan holding companies, and CDFIs operate. As several commenters noted, there can be significant benefits from exempting swaps entered into by small banks and CDFIs for the communities these entities serve.<sup>155</sup>

The Commission believes that most of the central banks, sovereign entities, IFIs, bank holding companies, savings and loan holding companies, and CDFIs that will benefit from these regulations also benefit from relief from the uncleared margin requirements under part 23 of the Commission's regulations. For entities that would be

---

<sup>153</sup> See discussion in the May 2020 Proposal, 85 FR at 27957 (citing 2012 End-User Exception, 77 FR at 42561-42562).

<sup>154</sup> See August 2018 Proposal, 83 FR at 44010.

<sup>155</sup> See CDFI Coalition comment at 1-2 ("providing regulatory certainty through codification of the no-action relief will help to ensure that community development financing remains available and commercially feasible for our country's most distressed communities"); *id.* at 4-6 ("CDFIs, like small financial institutions, face the same costs [cost of posting margin to a DCO, cost of initial and annual fixed clearing fees, other expenses, in addition to time, effort and resources necessary to establish relationships with an intermediary and clearinghouse access] and provide similar public benefits by serving smaller, local markets and providing financial and community development services to a target market"); and Opportunity Finance Network comment at 1 ("the exemption will save CDFIs the expense of clearing swaps through a third-party clearinghouse, allowing more of their resources to be devoted to their community development mission").

required to comply with the Commission's uncleared margin requirements, their benefit from an exemption would be mitigated. In addition, actual benefits may be less than expected if central banks, sovereign entities, and IFIs and their counterparties choose to clear their swaps voluntarily instead of relying on this exemption from the Clearing Requirement. As a practical matter, however, the Commission reviewed swap data and found that the entities that will benefit from the final rules are not clearing their swaps subject to the Clearing Requirement.<sup>156</sup> In that regard, the practical effect and primary benefit of the final regulations is to provide regulatory certainty, which will reduce the legal costs faced by these entities.

## 2. Section 15(a) Factors

The discussion that follows supplements the related cost and benefit considerations addressed in the preceding section and addresses the overall effect of the final rule in terms of the factors set forth in section 15(a) of the CEA.

### a. Protection of Market Participants and the Public

Section 15(a)(2)(A) of the CEA requires the Commission to evaluate the costs and benefits of a final regulation in light of considerations of protection of market participants and the public. The Commission considers the costs and benefits of the final regulations exempting swaps entered into with central banks, sovereign entities, IFIs, bank holding companies, savings and loan holding companies, and CDFIs from the Clearing Requirement in light of its responsibility for determining which swaps should be required to be cleared.

---

<sup>156</sup> Again, as the Commission noted in the May 2020 Proposal, the Commission reviewed data from January 1, 2018 to December 31, 2018 that was reported to DDR and found that 16 international financial institutions entered into approximately 2,500 uncleared interest rate swaps with an estimated total notional value of \$220 billion. Three IFIs elected to clear a portion of their interest rate swaps.

In recognition of the significant risk-mitigating benefits of central clearing, Congress amended the CEA to direct the Commission to review all swaps that are offered for clearing by DCOs to determine whether such swaps should be required to be cleared. The Commission is cognizant that in enacting the Dodd-Frank Act, Congress excluded from the definition of a swap any agreement, contract, or transaction wherein the counterparty is a Federal Reserve Bank, the Federal Government, or a Federal agency that is expressly backed by the full faith and credit of the United States. In so doing, Congress determined that swaps with the Federal Reserve Banks, the Federal Government, and Federal agencies are not subject to the Clearing Requirement. Under this final rule, the Commission is extending similar treatment for swap transactions with central banks and sovereign entities, as discussed above. With respect to certain bank holding companies, savings and loan holding companies, and CDFIs, the Commission believes that an exemption from the Clearing Requirement is similar to the regulatory treatment extended to swaps entered into with small banks, savings associations, farm credit institutions, and credit unions.

Under the final rules, counterparties entering into swaps with central banks, sovereign entities, IFIs, certain bank holding companies, savings and loan holding companies, and CDFIs will not have the protection afforded by central clearing through posting initial margin, daily variation margin payments, and other types of collateralization and risk mitigation associated with central clearing. The Commission, however, believes Congress would not have excluded the swaps entered into by the Federal Reserve Bank, the Federal Government, and Federal agencies from the definition of a swap if such transactions would pose a significant risk to market participants and the public.

As discussed above, the Commission believes that international comity supports an exemption for swaps entered into by central banks, sovereign entities, and IFIs and is an appropriate exercise of the Commission's authority under section 4(c) of the CEA. These institutions generally enter into a limited number of swaps in furtherance of their public interest missions. As such, while an exemption from the Clearing Requirement does result in reduced protection for counterparties, the Commission believes that the exemption for swaps with these entities does not pose a significant risk to market participants and the public.

Finally, like the small financial institutions listed in section 2(h)(7)(C)(ii) of the CEA, the Commission believes that certain bank holding companies, savings and loan holding companies, and CDFIs are likely to have limited swaps exposure, both in terms of value and number. As such, the Commission believes that the exemptions will have a minimal impact on market participants. In addition, counterparties to a swap entered into with a bank holding company, savings and loan holding company, or CDFI under these exemptions will have some degree of protection against default because the electing entity is required to indicate how it generally meets the financial obligations associated with its uncleared swaps.

The Commission also believes that the asset cap for bank holding companies and savings and loan holding companies whose transactions will be exempt from the Clearing Requirement, combined with the requirement that one of the counterparties to the swap adhere to the requirements of Commission regulation §50.50(b) and (c), means the exemptions are not likely to have a negative impact on market participants or the public.

b. Efficiency, Competitiveness, and Financial Integrity of Swap  
Markets

Section 15(a)(2)(B) of the CEA requires the Commission to evaluate the costs and benefits of a regulation in light of efficiency, competitiveness, and financial integrity considerations. As discussed above, these final amendments to part 50 are likely to lower the cost of using swaps, and in that sense, make trading more efficient. Another potential effect of the exemptions may be to increase liquidity in swap markets insofar as entering into swaps would be less costly. Any increase in trading would improve the competitiveness of swaps markets for all participants. However, because of the small number of swaps anticipated to fall under these exemptions, and the low notional value of such swaps executed by bank holding companies, savings and loan holding companies, and CDFIs, in particular, the Commission expects a minimal impact on the efficiency of the swap markets, and negligible impact on the financial integrity of the overall swaps market. The Commission notes that to the extent that these counterparties' swaps are currently not cleared because of reliance on the Commission's determination in the 2012 End-User Exception and DCR no-action letters, the practical impact of the exemptions on the efficiency, competitiveness, and financial integrity of the swap markets may be negligible.

c. Price Discovery

Section 15(a)(2)(C) of the CEA requires the Commission to evaluate the costs and benefits of its regulations in light of price discovery considerations. The Commission believes that these exemptions from the Clearing Requirement will not have a significant impact on price discovery. Typically, more liquidity supports greater price discovery as more participants enter the market and/or more trading occurs. To the extent that markets become more liquid, price discovery could improve. In regard to transparency of prices, swaps, whether cleared or uncleared, and regardless of the counterparty, are required by section 2(a)(13)(G) of the CEA to be reported to a swap data repository. These final

rules do not alter any independent reporting obligations under parts 23 or 45.

Accordingly, the price discovery function of the reporting requirement is unchanged.

In terms of price discovery through trade execution, the Commission notes that the swaps subject to these final rules would not typically be executed on an exchange. They also would not be subject to a trade execution requirement under section 2(h)(8) of the CEA.

d. Sound Risk Management Practices

Section 15(a)(2)(D) of the CEA requires the Commission to evaluate the costs and benefits of a regulation in light of sound risk management practices. The Commission believes that by eliminating the costs associated with clearing for central banks, sovereign entities, IFIs, bank holding companies, savings and loan holding companies, and IFIs, the Commission is facilitating the use of swaps by these entities. To the extent that these entities use swaps to hedge existing interest rate risk, the Commission believes the exemptions from the Clearing Requirement will enable better risk management at a potentially lower cost. The Commission also notes that swaps entered into by certain bank holding companies, savings and loan holding companies, and CDFIs tend to have small notional amounts, and the entities enter into swaps infrequently. Therefore, the Commission does not believe that swaps with these entities pose risk to U.S. financial markets.

e. Other Public Interest Considerations

Section 15(a)(2)(E) of the CEA requires the Commission to evaluate the costs and benefits of a regulation in light of other public interest considerations. As discussed above, the Commission believes that public interest and international comity support the exemption from the Clearing Requirement for swaps with central banks, sovereign entities, and IFIs. The Commission believes that the public interest mission of these

entities will be served by lowering the cost of financing in support of their public interest missions. For the other entities, the Commission has not identified any public interest considerations relevant to this rulemaking beyond those already noted.

### *C. Antitrust Considerations*

Section 15(b) of the CEA requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anti-competitive means of achieving the objectives of the CEA, as well as the policies and purposes of the CEA, in issuing any order or adopting any Commission rule or regulation (including any exemption under section 4(c) or 4c(b)).<sup>157</sup> The Commission believes that the public interest to be protected by the antitrust laws is generally to protect competition. The Commission did not identify anti-competitive effects of the Proposals. The Commission requested comment regarding its analysis about the possible anti-competitive effects of the proposed exemptions and whether there are specific public interests to be protected by the antitrust laws in this context.<sup>158</sup>

The Commission did not receive any comments. The Commission confirms its determination that these final rules establishing new exemptions from the Clearing Requirement under subpart D are not anti-competitive and have no anti-competitive effects. Given this determination, the Commission has not identified any less anti-competitive means of achieving the purposes of the CEA.

### **List of Subjects in 17 CFR Part 50**

Business and industry, Clearing, Cooperatives, Reporting requirements, Swaps.

For the reasons discussed in the preamble, the Commodity Futures Trading Commission amends 17 CFR chapter I as follows:

---

<sup>157</sup> Section 15(b) of the CEA.

<sup>158</sup> May 2020 Proposal, 85 FR at 27970; August 2018 Proposal, 83 FR at 44011.



## PART 50 – CLEARING REQUIREMENT AND RELATED RULES

1. The authority citation for part 50 is revised to read as follows:

Authority: 7 U.S.C. 2(h), 6(c), and 7a-1, as amended by Pub. L. 111-203, 124 Stat. 1376.

2. Revise subpart B heading to read as follows:

### Subpart B – Clearing Requirement Compliance Schedule and Compliance Dates

3. Add § 50.26 to read as follows:

#### § 50.26 Swap clearing requirement compliance dates.

(a) *Compliance dates for interest rate swap classes.* The compliance dates for swaps that are required to be cleared under § 50.4(a) are specified in the following table.

Table 1 to Paragraph (a)

| Swap Asset Class   | Swap Class Subtype | Currency and Floating Rate Index | Stated Termination Date Range | Clearing Requirement Compliance Date         |
|--------------------|--------------------|----------------------------------|-------------------------------|--|
| Interest Rate Swap | Fixed-to-Floating  | Euro (EUR)<br>EURIBOR            | 28 days to 50 years           | Category 1 entities<br>March 11, 2013        |
|                    |                    |                                  |                               | All non-Category 2 entities<br>June 10, 2013 |
|                    |                    |                                  |                               | Category 2 entities<br>September 9, 2013     |
| Interest Rate Swap | Fixed-to-Floating  | Sterling (GBP)<br>LIBOR          | 28 days to 50 years           | Category 1 entities<br>March 11, 2013        |
|                    |                    |                                  |                               | All non-Category 2 entities<br>June 10, 2013 |
|                    |                    |                                  |                               | Category 2 entities<br>September 9, 2013     |
| Interest Rate Swap | Fixed-to-Floating  | U.S. Dollar (USD)<br>LIBOR       | 28 days to 50 years           | Category 1 entities<br>March 11, 2013        |
|                    |                    |                                  |                               | All non-Category 2 entities<br>June 10, 2013 |
|                    |                    |                                  |                               | Category 2 entities<br>September 9, 2013     |
| Interest Rate Swap | Fixed-to-Floating  | Yen (JPY)<br>LIBOR               | 28 days to 50 years           | Category 1 entities<br>March 11, 2013        |
|                    |                    |                                  |                               | All non-Category 2 entities<br>June 10, 2013 |
|                    |                    |                                  |                               | Category 2 entities<br>September 9, 2013     |
| Interest Rate Swap | Fixed-to-Floating  | Australian Dollar (AUD)<br>BBSW  | 28 days to 30 years           | All entities<br>December 13, 2016            |
| Interest Rate Swap | Fixed-to-Floating  | Canadian Dollar (CAD)<br>CDOR    | 28 days to 30 years           | All entities<br>July 10, 2017                |

| Swap Asset Class   | Swap Class Subtype     | Currency and Floating Rate Index | Stated Termination Date Range | Clearing Requirement Compliance Date         |
|--------------------|------------------------|----------------------------------|-------------------------------|--|
| Interest Rate Swap | Fixed-to-Floating      | Hong Kong Dollar (HKD) HIBOR     | 28 days to 10 years           | All entities<br>August 30, 2017              |
| Interest Rate Swap | Fixed-to-Floating      | Mexican Peso (MXN) TIE-BANXICO   | 28 days to 21 years           | All entities<br>December 13, 2016            |
| Interest Rate Swap | Fixed-to-Floating      | Norwegian Krone (NOK) NIBOR      | 28 days to 10 years           | All entities<br>April 10, 2017               |
| Interest Rate Swap | Fixed-to-Floating      | Polish Zloty (PLN) WIBOR         | 28 days to 10 years           | All entities<br>April 10, 2017               |
| Interest Rate Swap | Fixed-to-Floating      | Singapore Dollar (SGD) SOR-VWAP  | 28 days to 10 years           | All entities<br>October 15, 2018             |
| Interest Rate Swap | Fixed-to-Floating      | Swedish Krona (SEK) STIBOR       | 28 days to 15 years           | All entities<br>April 10, 2017               |
| Interest Rate Swap | Fixed-to-Floating      | Swiss Franc (CHF) LIBOR          | 28 days to 30 years           | All entities<br>October 15, 2018             |
| Interest Rate Swap | Basis                  | Euro (EUR) EURIBOR               | 28 days to 50 years           | Category 1 entities<br>March 11, 2013        |
|                    |                        |                                  |                               | All non-Category 2 entities<br>June 10, 2013 |
|                    |                        |                                  |                               | Category 2 entities<br>September 9, 2013     |
| Interest Rate Swap | Basis                  | Sterling (GBP) LIBOR             | 28 days to 50 years           | Category 1 entities<br>March 11, 2013        |
|                    |                        |                                  |                               | All non-Category 2 entities<br>June 10, 2013 |
|                    |                        |                                  |                               | Category 2 entities<br>September 9, 2013     |
| Interest Rate Swap | Basis                  | U.S. Dollar (USD) LIBOR          | 28 days to 50 years           | Category 1 entities<br>March 11, 2013        |
|                    |                        |                                  |                               | All non-Category 2 entities<br>June 10, 2013 |
|                    |                        |                                  |                               | Category 2 entities<br>September 9, 2013     |
| Interest Rate Swap | Basis                  | Yen (JPY) LIBOR                  | 28 days to 30 years           | Category 1 entities<br>March 11, 2013        |
|                    |                        |                                  |                               | All non-Category 2 entities<br>June 10, 2013 |
|                    |                        |                                  |                               | Category 2 entities<br>September 9, 2013     |
| Interest Rate Swap | Basis                  | Australian Dollar (AUD) BBSW     | 28 days to 30 years           | All entities<br>December 13, 2016            |
| Interest Rate Swap | Forward Rate Agreement | Euro (EUR) EURIBOR               | 3 days to 3 years             | Category 1 entities<br>March 11, 2013        |
|                    |                        |                                  |                               | All non-Category 2 entities<br>June 10, 2013 |
|                    |                        |                                  |                               | Category 2 entities<br>September 9, 2013     |
| Interest Rate Swap | Forward Rate Agreement | Sterling (GBP) LIBOR             | 3 days to 3 years             | Category 1 entities<br>March 11, 2013        |

| Swap Asset Class   | Swap Class Subtype     | Currency and Floating Rate Index  | Stated Termination Date Range | Clearing Requirement Compliance Date         |
|--------------------|------------------------|-----------------------------------|-------------------------------|--|
|                    |                        |                                   |                               | All non-Category 2 entities<br>June 10, 2013 |
|                    |                        |                                   |                               | Category 2 entities<br>September 9, 2013     |
| Interest Rate Swap | Forward Rate Agreement | U.S. Dollar (USD) LIBOR           | 3 days to 3 years             | Category 1 entities<br>March 11, 2013        |
|                    |                        |                                   |                               | All non-Category 2 entities<br>June 10, 2013 |
|                    |                        |                                   |                               | Category 2 entities<br>September 9, 2013     |
| Interest Rate Swap | Forward Rate Agreement | Yen (JPY) LIBOR                   | 3 days to 3 years             | Category 1 entities<br>March 11, 2013        |
|                    |                        |                                   |                               | All non-Category 2 entities<br>June 10, 2013 |
|                    |                        |                                   |                               | Category 2 entities<br>September 9, 2013     |
| Interest Rate Swap | Forward Rate Agreement | Polish Zloty (PLN) WIBOR          | 3 days to 2 years             | All entities<br>April 10, 2017               |
| Interest Rate Swap | Forward Rate Agreement | Norwegian Krone (NOK) NIBOR       | 3 days to 2 years             | All entities<br>April 10, 2017               |
| Interest Rate Swap | Forward Rate Agreement | Swedish Krona (SEK) STIBOR        | 3 days to 3 years             | All entities<br>April 10, 2017               |
| Interest Rate Swap | Overnight Index Swap   | Euro (EUR) EONIA                  | 7 days to 2 years             | Category 1 entities<br>March 11, 2013        |
|                    |                        |                                   |                               | All non-Category 2 entities<br>June 10, 2013 |
|                    |                        |                                   |                               | Category 2 entities<br>September 9, 2013     |
|                    |                        |                                   | 2 years + 1 day to 3 years    | All entities<br>December 13, 2016            |
| Interest Rate Swap | Overnight Index Swap   | Sterling (GBP) SONIA              | 7 days to 2 years             | Category 1 entities<br>March 11, 2013        |
|                    |                        |                                   |                               | All non-Category 2 entities<br>June 10, 2013 |
|                    |                        |                                   |                               | Category 2 entities<br>September 9, 2013     |
|                    |                        |                                   | 2 years + 1 day to 3 years    | All entities<br>December 13, 2016            |
| Interest Rate Swap | Overnight Index Swap   | U.S. Dollar (USD) FedFunds        | 7 days to 2 years             | Category 1 entities<br>March 11, 2013        |
|                    |                        |                                   |                               | All non-Category 2 entities<br>June 10, 2013 |
|                    |                        |                                   |                               | Category 2 entities<br>September 9, 2013     |
|                    |                        |                                   | 2 years + 1 day to 3 years    | All entities<br>December 13, 2016            |
| Interest Rate Swap | Overnight Index Swap   | Australian Dollar (AUD) AONIA-OIS | 7 days to 2 years             | All entities<br>December 13, 2016            |
| Interest Rate Swap | Overnight Index Swap   | Canadian Dollar (CAD) CORRA-OIS   | 7 days to 2 years             | All entities<br>July 10, 2017                |

(b) *Compliance dates for credit default swap classes.* The compliance dates for swaps that are required to be cleared under § 50.4(b) are specified in the following table.

Table 2 to Paragraph (b)

| Swap Asset Class    | Swap Class Subtype                  | Indices                 | Tenor           | Clearing Requirement Compliance Date            |
|---------------------|-------------------------------------|-------------------------|-----------------|---|
| Credit Default Swap | North American untranch CDS indices | CDX.NA.IG               | 3Y, 5Y, 7Y, 10Y | Category 1 entities<br>March 11, 2013           |
|                     |                                     |                         |                 | All non-Category 2 entities<br>June 10, 2013    |
|                     |                                     |                         |                 | Category 2 entities<br>September 9, 2013        |
| Credit Default Swap | North American untranch CDS indices | CDX.NA.HY               | 5Y              | Category 1 entities<br>March 11, 2013           |
|                     |                                     |                         |                 | All non-Category 2 entities<br>June 10, 2013    |
|                     |                                     |                         |                 | Category 2 entities<br>September 9, 2013        |
| Credit Default Swap | European untranch CSD indices       | iTraxx Europe           | 5Y, 10Y         | Category 1 entities<br>April 26, 2013           |
|                     |                                     |                         |                 | Category 2 entities<br>July 25, 2013            |
|                     |                                     |                         |                 | All non-Category 2 entities<br>October 23, 2013 |
| Credit Default Swap | European untranch CSD indices       | iTraxx Europe Crossover | 5Y              | Category 1 entities<br>April 26, 2013           |
|                     |                                     |                         |                 | Category 2 entities<br>July 25, 2013            |
|                     |                                     |                         |                 | All non-Category 2 entities<br>October 23, 2013 |
| Credit Default Swap | European untranch CSD indices       | iTraxx Europe HiVol     | 5Y              | Category 1 entities<br>April 26, 2013           |
|                     |                                     |                         |                 | Category 2 entities<br>July 25, 2013            |
|                     |                                     |                         |                 | All non-Category 2 entities<br>October 23, 2013 |

4. Revise subpart C heading to read as follows:

**Subpart C – Exceptions and Exemptions from the Clearing Requirement**

5. In § 50.50, revise section heading and paragraph (b)(1)(iii)(A)(2) and remove paragraph (d) to read as follows:

**§ 50.50 Non-financial end-user exception to the clearing requirement.**

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(iii) \* \* \*

(A) \* \* \*

(2) Exempt from the definition of “financial entity” as described in § 50.53;

\* \* \* \* \*

6. In § 50.51, revise section heading and paragraphs (a)(3)(i) and (ii) to read as follows:

**§ 50.51 Cooperatives exempt from the clearing requirement.**

\* \* \* \* \*

(a) \* \* \*

(3) \* \* \*

(i) Exempt from the definition of “financial entity” pursuant to § 50.53; or

(ii) A cooperative formed under Federal or state law as a cooperative and each member thereof is either not a “financial entity,” as defined in section 2(h)(7)(C)(i) of the Act, or is exempt from the definition of “financial entity” pursuant to § 50.53.

\* \* \* \* \*

7. Revise § 50.52 heading to read as follows:

**§ 50.52 Affiliated entities exempt from the clearing requirement.**

8. Add § 50.53 to read as follows:

**§ 50.53 Banks, savings associations, farm credit system institutions, and credit unions exempt from the clearing requirement.**

For purposes of section 2(h)(7)(A) of the Act, a person that is a “financial entity” solely because of section 2(h)(7)(C)(i)(VIII) shall be exempt from the definition of “financial entity” and is eligible to elect the exception to the clearing requirement under § 50.50, if such person:

(a) Is organized as a bank, as defined in section 3(a) of the Federal Deposit Insurance Act, the deposits of which are insured by the Federal Deposit Insurance Corporation; a savings association, as defined in section 3(b) of the Federal Deposit Insurance Act, the deposits of which are insured by the Federal Deposit Insurance Corporation; a farm credit system institution chartered under the Farm Credit Act of 1971; or an insured Federal credit union or State-chartered credit union under the Federal Credit Union Act; and

(b) Has total assets of \$10,000,000,000 or less on the last day of such person's most recent fiscal year;

(c) Reports, or causes to be reported, the swap to a swap data repository pursuant to §§ 45.3 and 45.4 of this chapter, and reports, or causes to be reported, all information as provided in paragraph (b) of § 50.50 to a swap data repository; and

(d) Is using the swap to hedge or mitigate commercial risk as provided in paragraph (c) of § 50.50.

9. Add subpart D to read as follows:

**Subpart D – Swaps Not Subject to the Clearing Requirement**

Sec.

50.75 Swaps entered into by central banks or sovereign entities.

50.76 Swaps entered into by international financial institutions.

50.77 Interest rate swaps entered into by community development financial institutions.

50.78 Swaps entered into by bank holding companies.

50.79 Swaps entered into by savings and loan holding companies.

**§ 50.75 Swaps entered into by central banks or sovereign entities.**

Swaps entered into by a central bank or sovereign entity shall be exempt from the clearing requirement of section 2(h)(1)(A) of the Act.

(a) For the purposes of this section, the term *central bank* means a reserve bank or monetary authority of a central government (including the Board of Governors of the

Federal Reserve System or any of the Federal Reserve Banks) or the Bank for International Settlements.

(b) For the purposes of this section, the term *sovereign entity* means a central government (including the U.S. Government), or an agency, department, or ministry of a central government.

**§ 50.76 Swaps entered into by international financial institutions.**

(a) Swaps entered into by an international financial institution shall be exempt from the clearing requirement of section 2(h)(1)(A) of the Act.

(b) For purposes of this section, the term *international financial institution* means:

- (1) African Development Bank;
- (2) African Development Fund;
- (3) Asian Development Bank;
- (4) Banco Centroamericano de Integración Económica;
- (5) Bank for Economic Cooperation and Development in the Middle East and North Africa;
- (6) Caribbean Development Bank;
- (7) Corporación Andina de Fomento;
- (8) Council of Europe Development Bank;
- (9) European Bank for Reconstruction and Development;
- (10) European Investment Bank;
- (11) European Investment Fund;
- (12) European Stability Mechanism;
- (13) Inter-American Development Bank;
- (14) Inter-American Investment Corporation;
- (15) International Bank for Reconstruction and Development;

- (16) International Development Association;
- (17) International Finance Corporation;
- (18) International Monetary Fund;
- (19) Islamic Development Bank;
- (20) Multilateral Investment Guarantee Agency;
- (21) Nordic Investment Bank;
- (22) North American Development Bank; and
- (23) Any other entity that provides financing for national or regional development in which the U.S. Government is a shareholder or contributing member.

**§ 50.77 Interest rate swaps entered into by community development financial institutions.**

(a) For the purposes of this section, the term *community development financial institution* means an entity that satisfies the definition in section 103(5) of the Community Development Banking and Financial Institutions Act of 1994, and is certified by the U.S. Department of the Treasury's Community Development Financial Institution Fund as meeting the requirements set forth in 12 CFR 1805.201(b).

(b) A swap entered into by a community development financial institution shall not be subject to the clearing requirement of section 2(h)(1)(A) of the Act and this part if:

(1) The swap is a U.S. dollar denominated interest rate swap in the fixed-to-floating class or the forward rate agreement class of swaps that would otherwise be subject to the clearing requirement under § 50.4(a);

(2) The total aggregate notional value of all swaps entered into by the community development financial institution during the 365 calendar days prior to the day of execution of the swap is less than or equal to \$200,000,000;



(3) The swap is one of ten or fewer swap transactions that the community development financial institution enters into within a period of 365 calendar days;

(4) One of the counterparties to the swap reports the swap to a swap data repository pursuant to §§ 45.3 and 45.4 of this chapter, and reports all information as provided in paragraph (b) of § 50.50 to a swap data repository; and

(5) The swap is used to hedge or mitigate commercial risk as provided in paragraph (c) of § 50.50.

**§ 50.78 Swaps entered into by bank holding companies.**

(a) For purposes of this section, the term *bank holding company* means an entity that is organized as a bank holding company, as defined in section 2 of the Bank Holding Company Act of 1956.

(b) A swap entered into by a bank holding company shall not be subject to the clearing requirement of section 2(h)(1)(A) of the Act and this part if:

(1) The bank holding company has aggregated assets, including the assets of all of its subsidiaries, that do not exceed \$10,000,000,000 according to the value of assets of each subsidiary on the last day of each subsidiary's most recent fiscal year;

(2) One of the counterparties to the swap reports the swap to a swap data repository pursuant to §§ 45.3 and 45.4 of this chapter, and reports all information as provided in paragraph (b) of § 50.50 to a swap data repository; and

(3) The swap is used to hedge or mitigate commercial risk as provided in paragraph (c) of § 50.50.

**§ 50.79 Swaps entered into by savings and loan holding companies.**

(a) For purposes of this section, the term *savings and loan holding company* means an entity that is organized as a savings and loan holding company, as defined in section 10 of the Home Owners' Loan Act of 1933.

(b) A swap entered into by a savings and loan holding company shall not be subject to the clearing requirement of section 2(h)(1)(A) of the Act and this part if:

(1) The savings and loan holding company has aggregated assets, including the assets of all of its subsidiaries, that do not exceed \$10,000,000,000 according to the value of assets of each subsidiary on the last day of each subsidiary's most recent fiscal year;

(2) One of the counterparties to the swap reports the swap to a swap data repository pursuant to §§ 45.3 and 45.4 of this chapter, and reports all information as provided in paragraph (b) of § 50.50 to a swap data repository; and

(3) The swap is used to hedge or mitigate commercial risk as provided in paragraph (c) of § 50.50.

Issued in Washington, DC, on November 12, 2020, by the Commission.

Christopher Kirkpatrick,

*Secretary of the Commission.*

NOTE: The following appendices will not appear in the Code of Federal Regulations.

**Appendices to Swap Clearing Requirement Exemptions – Commission Voting Summary, Chairman's Statement, and Commissioners' Statements**

**Appendix 1 – Commission Voting Summary**

On this matter, Chairman Tarbert and Commissioners Quintenz, Behnam, Stump, and Berkovitz voted in the affirmative. No Commissioner voted in the negative.

**Appendix 2 – Statement of Support of Chairman Heath P. Tarbert**

I am pleased to support today's final rule amending the CFTC's Part 50 rules, which implement the swap clearing requirement of section 2(h)(1) of the Commodity Exchange Act (the Clearing Requirement). The final rule concurrently achieves two ends—it demonstrates the CFTC's evolving philosophy on comity and deference towards

our international counterparts while alleviating unnecessary regulatory burdens on small domestic institutions that look nothing like Wall Street banks.

First, today's final rule creates new regulations 50.75 and 50.76, which codify existing exemptions from the Clearing Requirement for swaps entered into with certain central banks, sovereign entities, and international financial institutions. Just as we would not expect a foreign regulator to impose clearing requirements on the United States Treasury or the Federal Reserve for entering into swaps on behalf of our government, the CFTC will not impose similar requirements on other nations' finance ministries and central banks. The same is true for multilateral governmental institutions such as the World Bank Group and the International Monetary Fund. Mutual respect and a two-way-street must be the cornerstone of our international regulatory relations.

Second, the final rule establishes new regulations 50.77, 50.78, and 50.79, which exempt from the Clearing Requirement certain swaps entered into by small bank holding companies, savings and loan holding companies, and community development financial institutions. In addition, the final rule clarifies existing exemptions for banks, savings associations, farm credit systems, and credit unions with total assets of less than \$10 billion. These entities are the engines of the real economy, providing financial support to American communities, businesses, and families. While exempting these entities from the Clearing Requirement makes sense in normal times, doing so is especially critical now. As we continue to manage the fallout of the COVID-19 (coronavirus) pandemic, it is particularly important that the CFTC advance our strategic goal of regulating the derivatives markets to promote the interests of all Americans.<sup>1</sup> Today's final rule is a step in that direction.

---

<sup>1</sup> CFTC Strategic Plan 2020-2024, at 6 (discussing Strategic Goal 2), [https://www.cftc.gov/media/3871/CFTC2020\\_2024StrategicPlan/download](https://www.cftc.gov/media/3871/CFTC2020_2024StrategicPlan/download).

### **Appendix 3 – Supporting Statement of Commissioner Brian D. Quintenz**

I am pleased to support this final rule, which codifies existing relief from the Commission’s requirement that certain commonly traded interest rate swaps and credit default swaps be cleared following their execution.<sup>1</sup> The new exemptions may be elected by several classes of counterparties that may enter into these swaps, namely: *sovereign nations*; *central banks*; “*international financial institutions*” of which sovereign nations are members; *bank holding companies*, and *savings and loan holding companies*, whose assets total no more than \$10 billion; and *community development financial institutions* recognized by the U.S. Treasury Department. Today’s final rule notes that many of these entities have actually relied on existing relief, electing not to clear swaps that are generally subject to the clearing requirement. I strongly support the policy of international “comity” described in the final rule, recognizing that sovereign nations and their instrumentalities should generally not be subject to the Commission’s regulations. I trust that by issuing this rule, the United States, the Federal Reserve, and other U.S. government instrumentalities will receive the same treatment in foreign jurisdictions.

### **Appendix 4 – Statement of Commissioner Dan M. Berkovitz**

I am voting for the final rule codifying certain limited exemptions from the swap clearing requirement that currently exist through Commission guidance or staff no action relief. The exemptions are consistent with longstanding Commission policies. Analysis of available historical data shows that the number and notional amount of swaps that would be exempted are relatively limited and not likely to materially impact systemic risk. Furthermore, the swaps exempted from clearing will be subject to uncleared swap

---

<sup>1</sup> The swap clearing requirement is codified in part 50 of the Commission’s regulations (17 CFR part 50).

margin requirements, if applicable, thereby mitigating the risks of not clearing these swaps.

The final rule codifies in rule text exemptions for swaps entered into by foreign central banks, sovereign entities at the national level, and certain international institutions that previously have been exempted from the clearing requirement through no action relief or guidance. In this regard, the final rule represents a proper exercise of international comity in recognition of the governmental nature and non-speculative purposes of these sovereign entities and international institutions.

The final rule also provides clearing exemptions for certain interest rate swaps of community development financial institutions, subject to a number of significant limits, and for swaps entered into by bank or savings and loan holding companies that have no more than \$10 billion in consolidated assets. In each case, the exemption only applies if the swap is used to hedge or mitigate commercial risks. Congress provided in Commodity Exchange Act section 2(h)(7)(C) for an exclusion from the clearing requirement for banks and savings associations with less than \$10 billion in assets to the extent determined by the Commission. It is appropriate to apply this exemption to the holding companies of these financial entities.

One commenter, Better Markets, expressed concern that the number of entities that will now have an exemption from the clearing requirement has grown over time, leading to the potential for greater risk, reduction in liquidity in cleared markets, and complexity in managing the exemptions. As described in the preamble to the final rule, swap data repository data indicates that over the past several years the number and scope of swaps entered into by these institutions that will be included within the exemptions has been relatively limited. Given this data, these concerns, today, do not outweigh the benefits of the final rule. However, the Commission should periodically review the SDR

data to reassess whether the clearing requirement exemptions are cumulatively having a material impact on the extent of swap clearing given the intent of the Dodd-Frank Act. The Commission can then evaluate whether, on a going forward basis, any changes to the exemptions may be warranted.

I commend the staff of the Division of Clearing and Risk for this well developed and drafted final rule. The clarity and completeness of the final release helps establish a sound basis for the Commission to approve the final rule.

[FR Doc. 2020-25394 Filed: 11/27/2020 8:45 am; Publication Date: 11/30/2020]